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SPEECHES OR ARGUMENTS

OF THE Hargrave

JUDGES of the COURT of KING's BENCH,

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Mr. JUSTICE WILLES, | Sir JOSEPH YATES, and
Mr. JUSTICE ASTON, | Lord C. Juſtice MANSFIELD

IN APRIL 1769;

In the CAUSE MILLAR againſt TAYLOR,

For printing THOMSON's SEASONS.

MUSEUM BRITANNICUM

TO WHICH ARE ADDED

EXPLANATORY NOTES,

And an APPENDIX, containing a SHORT STATE of LITERARY PROPERTY.

By the EDITOR.

PRINTED for WILLIAM COKE, Bookſeller in LEITH, in the YEAR MDCCLXXX.

MVSEVM
BRITANNICVM

ADVERTISEMENT.

THE following SPEECHES were taken down by a ſhort-hand writer, and ſeveral copies of them were afterwards tranſcribed, two of which have been collated by the editor, who is ſorry that they are not ſo complete as he could have wiſhed; however all due pains has been taken to have them as perfect as poſſible. The ſhort-hand writer has omitted the Latin ſentences or phraſes, as he did not underſtand that language, and blanks are generally left at theſe places where they occur. Some notes are added occaſionally, chiefly for elucidating ſome obſcurities; and through the whole nothing has been wilfully perverted.—At firſt it was intended to have printed Sir Joſeph Yates's opinion by itſelf; but as the public, in that caſe, might have thought that the arguments of the other three judges had been deſignedly ſuppreſſed, therefore the whole are now printed in the ſame order they were delivered in court; the youngeſt judge beginning firſt, then the ſecond and third, and laſt of all the Lord Chief Juſtice.

For the better underſtanding theſe ſpeeches, the ſtatute of Queen Anne, ſo often mentioned in them, is prefixed; and what the editor had to offer beſides the notes, is added by way of Appendix, in order to give, by this publication, a ſhort view of the preſent ſtate of LITERARY PROPERTY.

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Anno Octavo Annæ Reginæ.

An Act for the Encouragement of Learning, by veſting the Copies of printed Books in the Authors or Purchaſers of ſuch Copies, during the times therein mentioned.

WHereas Printers, Bookſellers, and other perſons, have of late frequently taken the liberty of printing, reprinting, and publiſhing, or cauſing to be printed, reprinted, and publiſhed, books, and other writings, without the conſent of the authors or proprietors of ſuch books and writings, to their very great detriment, and too often to the ruin of them and their families: For preventing therefore ſuch practices for the future, and for the encouragement of learned men to compoſe and write uſeful books; may it pleaſe your Majeſty, that it be enacted, and be it enacted by the Queen's moſt excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons in this preſent parliament aſſembled, and by the authority of the ſame, That from and after the tenth day of April, one thouſand ſeven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of ſuch book or books, ſhare or ſhares thereof, or the bookſeller or bookſellers, printer or printers, or other perſon or perſons, who hath or have purchaſed or acquired the copy or copies of any book or books, in order to print or reprint the ſame, ſhall have the ſole right and liberty of printing ſuch book and books for the term of one and twenty years, to commence from the ſaid tenth day of April and no longer; and that the author of any book or books already compoſed, and not printed and publiſhed, or that ſhall hereafter be compoſed, and his aſſignee or aſſigns, ſhall have the ſole liberty of printing and reprinting ſuch book and books for the term of fourteen years, to commence from the day of the firſt publiſhing the ſame, and no longer; and that if any other bookſeller, printer, or other perſon whatſoever, from and after the tenth day of April, one thouſand ſeven hundred and ten, within the times granted and limited by this act, as aforeſaid, ſhall print, reprint, or import

import, or cauſe to be printed, reprinted, or imported, any ſuch book or books, without the conſent of the proprietor or proprietors thereof firſt had and obtained in writing, ſigned in the preſence of two or more credible witneſſes, or knowing the ſame to be ſo printed, or reprinted, without the conſent of the proprietors, ſhall ſell, publiſh, or expoſe to ſale, or cauſe to be ſold, publiſhed, or expoſed to ſale any ſuch book or books, without ſuch conſent firſt had and obtained, as aforeſaid, Then ſuch offender or offenders ſhall forfeit ſuch book or books, and all and every ſheet or ſheets, being part of ſuch book or books, to the proprietor or proprietors of the copy thereof, who ſhall forthwith damaſk, and make waſte paper of them: And further, That every ſuch offender or offenders ſhall forfeit one penny for every ſheet which ſhall be found in his, her, or their cuſtody, either printed or printing, publiſhed or expoſed to ſale, contrary to the true intent and meaning of this act, the one moiety thereof to the Queen's moſt excellent Majeſty, her heirs and ſucceſſors, and the other moiety thereof to any perſon or perſons that ſhall ſue for the ſame, to be recovered in any of her Majeſties courts of record at Weſtminſter, by action of debt, bill, plaint, or information, in which no wager of law, eſſoign, privilege, or protection, or more than one imparlance ſhall be allowed.

And whereas many perſons may through ignorance offend againſt this act, unleſs ſome proviſion be made, whereby the property in every ſuch book as is intended by this act to be ſecured to the proprietor or proprietors thereof, may be aſcertained, as likewiſe the conſent of ſuch proprietor or proprietors for the printing or reprinting of ſuch book or books may from time to time be known; be it therefore further enacted, by the authority aforeſaid, That nothing in this act contained ſhall be conſtrued to extend to ſubject any bookſeller, printer, or other perſon whatſoever, to the forfeitures or penalties therein mentioned, for or by reaſon of the printing or reprinting of any book or books without ſuch conſent, as aforeſaid, unleſs the title to the copy, or ſuch book or books hereafter publiſhed, ſhall, before ſuch publication, be enter-

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ed in the regiſter-book of the company of ſtationers, in ſuch manner as hath been uſual; which regiſter-book ſhall at all times be kept at the hall of the ſaid company, and unleſs ſuch conſent of the proprietor or proprietors be in like manner entered, as aforeſaid, for every of which ſeveral entries, ſix pence ſhall be paid, and no more; which ſaid regiſter-book may, at all ſeaſonable and convenient times, be reſorted to and inſpected by any bookſeller, printer, or other perſon, for the purpoſes before mentioned, without any fee or reward; and the clerk of the ſaid company of ſtationers ſhall, when and as often as thereunto required, give a certificate under his hand of ſuch entry or entries, and for every ſuch certificate may take a fee not exceeding ſix pence.

Provided always, and it is hereby enacted, That nine copies of each book or books, upon the beſt paper, that, from and after the ſaid tenth day of April, one thouſand ſeven hundred and ten, ſhall be printed and publiſhed as aforeſaid, or reprinted and publiſhed with additions, ſhall, by the printer and printers thereof, be delivered to the warehouſe keeper of the ſaid company of ſtationers for the time being, at the hall of the ſaid company, before ſuch publication made, for the uſe of the royal library, the libraries of the univerſities of Oxford and Cambridge, the libraries of the four univerſities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the Faculty of Advocates at Edinburgh, reſpectively; which ſaid warehouſe-keeper is hereby required, within ten days after the demand by the keepers of the reſpective libraries, or any perſon or perſons by them or any of them authoriſed to demand the ſaid copy, to deliver the ſame, for the uſe of the aforeſaid libraries; and if any proprietor, bookſeller, or printer, or the ſaid warehouſe-keeper of the ſaid company of ſtationers, ſhall not obſerve the direction of this act therein, that then he and they ſo making default, in not delivering the ſaid printed copies, as aforeſaid, ſhall forfeit, beſides the value of the ſaid printed copies, the ſum of five pounds for every copy not ſo delivered, as alſo the value of the ſaid printed copy not ſo delivered, the ſame to be recovered

covered by the Queen's Majeſty, her heirs and ſucceſſors, and by the chancellor, maſters, and ſcholars of the ſaid univerſities, and by the preſident and fellows of Sion College, and the ſaid faculty of advocates at Edinburgh, with their full coſts reſpectively.

Provided always, and be it further enacted, That if any perſon or perſons incur the penalties contained in this act, in that part of Great Britain called Scotland, they ſhall be recoverable by an action before the Court of Seſſion there.

Provided, That nothing in this act contained do extend, or ſhall be conſtrued to extend, to prohibit the importation, vending, or ſelling of any books in Greek, Latin, or any other foreign language printed beyond the ſeas; any thing in this act contained to the contrary notwithſtanding.

And be it further enacted by the authority aforeſaid, That if any action or ſuit ſhall be commenced or brought againſt any perſon or perſons whatſoever, for doing or cauſing to be done any thing in purſuance of this act, the defendants in ſuch action may plead the general iſſue, and give the ſpecial matter in evidence; and if upon ſuch action a verdict be given for the defendant, or the plaintiff become nonſuited, or diſcontinue his action, then the defendant ſhall have and recover his full coſts, for which he ſhall have the ſame remedy as a defendant in any caſe by law hath.

Provided, That nothing in this act contained ſhall extend, or be conſtrued to extend, either to prejudiſe or confirm any right that the ſaid univerſities, or any of them, or any perſon or perſons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

Provided nevertheleſs, That all actions, ſuits, bills, indictments, or informations for any offence that ſhall be committed againſt this act, ſhall be brought, ſued, and commenced within three months next after ſuch offence committed, or elſe the ſame ſhall be void and of none effect.

Provided always, That after the expiration of the ſaid term of fourteen years, the ſole right of printing or diſpoſing of copies ſhall return to the authors thereof, if they are then living, for another term of fourteen years.

THE OPINIONS OR ARGUMENTS OF THE JUDGES of the COURT of KING'S-BENCH, in April 1769;

In the CAUSE, MILLAR againſt TAYLOR.

For reprinting a book intitled, THOMSON'S SEASONS, of which Millar claimed the excluſive property, as purchaſer of the copy-right; which Taylor alledged was expired, according to the terms allowed by the ſtatute 8vo ANNÆ.

MR. JUSTICE WILLES.

THIS cauſe of Millar and Taylor comes before the court on a ſpecial verdict in an action, in which Millar is the plaintiff, and Taylor the defendant. In this action the plaintiff ſtates, that he has been, and ſtill is, the true and only proprietor of a certain book of poems, intituled The Seaſons; and that he had, at his own proper coſt and charge, cauſed two thouſand copies of the ſaid book to be printed for ſale, and had a great number of theſe books remaining in his hands for ſale: And that the defendant publiſhed and expoſed to ſale, ſeveral other books, intituled, The Seaſons, by James Thomſon, Eſq; and printed the ſame without the licence and conſent of the plaintiff; by means whereof the plaintiff was deprived of the benefit of the copy, for which he lays the damage at

two hundred pounds. The defendant pleaded Not guilty. At the trial, the jury have found this ſpecial verdict: They ſay the work is an original, compoſition by James Thomſon Eſquire, a natural born ſubject, reſident in that part of Great Britain called England, at firſt publiſhed and printed by James Thomſon for his own uſe and benefit, at ſeveral times, between the beginning of the year 1727 and 1729, the ſame having never been before printed elſewhere: And the ſpecial verdict further finds, Andrew Millar the plaintiff, in the year 1729, purchaſed this work called The Seaſons, for a valuable conſideration, of James Thomſon the author and proprietor, to him, his heirs and aſſigns for ever: And the ſpecial verdict further ſtates, that from the time of the purchaſe, Andrew Millar has printed and ſold the ſaid work, and now has, and conſtantly had a ſufficient number of the books of the ſaid work expoſed to ſale at a reaſonable price: And the ſame verdict goes on and finds, that before the reign of Queen Anne, it was uſual to purchaſe the works of authors, and ſell the ſame, and make it the ſubject of family ſettlements for the proviſion of a wife and children; and they have found two orders of the Stationers Company, a by-law, one dated 1694, whereby the property of authors in their books are ſecured by penalty: And it goes on further, and ſays, That the ſaid work, before the publication by the plaintiff Andrew Millar, and before the printing of it by Robert Taylor, was regiſtered in the regiſter of the Stationers Company in London: And the verdict further finds, that James Thomſon died in 1748, and after his death, and before the action was brought, Robert Taylor the defendant, without licence of the ſaid Andrew Miller, publiſhed and expoſed to ſale ſeveral copies of this book, within that part of the realm called Great Britain; and they ſubmit to the judgment of this court, if for the plaintiff they find a verdict of one ſhilling damages. The queſtion of law muſt ariſe from out of the facts found

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by the ſpecial verdict *; ſome of them are worthy obſervation. And they find the work is an original compoſition, firſt printed and publiſhed in London; the author a natural born ſubject, reſident in England; therefore this caſe has nothing to do with foreign books, which ſtand on a very different footing. It is alſo found, that the author printed this book from the beginning of the year 1727, till the end of the year 1729, for his own uſe and benefit as the proprietor; and then ſold the copy to the plaintiff, his heirs and aſſigns for ever, for a full and valuable conſideration; therefore there is no occaſion to meddle with caſes where the authors may be ſuppoſed to have relinquiſhed the property, and they have given a licence to print. Many of the beſt books fall under that deſcription. If the book had not been entered before publication, that will be a circumſtance ſubmitted to the jury, that the copy was intended to be left open; ſo in after publications, the author had not acted himſelf as proprietor; but the caſe here being for the ſale and transfer for a valuable conſideration, this will not authoriſe printing it, without an act of conveyance from the authors †. It is alſo found, that the plaintiff had a ſufficient number of books expoſed to ſale at a reaſonable price; therefore this caſe has nothing to do with caſes where the plaintiff's relief which may by ſhewing

would

would have

be impugned

* In this caſe the jury were charged to find the fact of publication only, (which was not denied) in the ſame manner as was done in the trials of the printers for libels; this method of curtailing the powers of juries, and leaving the defendant at the mercy of the court, who, by this fineſſe, become both judges and jury, has been fully exploded, and clearly ſhown to be illegal; ſo that this cauſe can never be uſed as a precedent. There muſt be ſome other trial, where both the fact and the law are left to the determination of a jury, and no BRITISH JURY can ever find a perſon guilty, who has not infringed the ſtatute 8vo ANNÆ, above-mentioned.

† The ſtatute 8vo ANNÆ gives a licence to print any work, after a certain period; in this caſe the time was long elapſed, ſo the defendant had no occaſion to aſk for any allowance to print the book in queſtion, as it was become common property.

intended to inhance the price, which is againſt the law. It is found too, that the defendant ſold ſeveral copies of the ſaid books; therefore this caſe is not embaraſſed with any queſtion, wherein conſiſts the idea of the books; tranſlations and abridgements are different, and in requeſt to the property of new works, but colourable variations will not do. This is not the caſe like that obtained by aſſignees under a commiſſion againſt a bankrupt author: when a queſtion of that ſort ariſes, the court will conſider what is right, and the ſame queſtion may originally ariſe on the term granted by act of parliament; and therefore there is not a doubt but it ſubſiſts merely on a * common-law-right. If the copy of the book belonged to the author, there is no doubt, and if the plaintiff by transfer does become poſſeſſed of a property, there is no doubt but the defendant has done him injury, and violated his right, for which this action is brought. But by the ſtatute of Queen Anne, the author's right to the copy depends upon two queſtions. Firſt, Whether the copy of a book or literary compoſition belonged to the author by the common law. Secondly, Whether the common-law right of authors to their own books is taken away by the 8th of Queen Anne †. The name *Copy of a Book*, which has endured for ages, is a term to ſignify publiſhing and ſelling it, ſhews that ſpecies of property, I believe long known. Down to the year 1640, the Crown exerciſed an unlimited authority over the preſs; this was given to the Stationers Company all over the realm, and by the ſupreme juriſdiction of the Star-chamber, without the leaſt obſtruction of Weſtminſter-hall or the Parliament in any inſtance. Whether before the year 1640, copy-rights exiſted

* This is a very curious concluſion drawn without any premiſes: There is ſome ſophiſtry in this way of arguing, but neither law nor reaſon.

† There is not in the whole ſtatute a ſingle ſyllable of common law-right: How the learned judge ſuppoſes the ſtatute-right of the author depends upon theſe two queſtions, which he himſelf infers, without any *data*, is very ſurprizing; he may by the ſame artificial way of reaſoning by *inference*, explain away the meaning of any ſtatute whatever.

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but he might transfer it to the Gilt,

in the kingdom on principles of uſage, can only be looked for in the Stationers Company, the Star-chamber, or acts of ſtate; and to this point, they are evidences competent and liable to no ſuſpicion. It was indifferent to the government whether the copy of an innocent book was publick or private. It could be done only on principles of private juſtice, moral fitneſs and publick convenience, which when applied to a new ſubject make common law without a precedent, much more when received and improved by uſage to authors. It appears by the acts of ſtate, taken notice of at the bar, that unleſs pirating another man's property be an abuſe on ſuch principles as make a common law right, it is not prohibited. The decree of the Star-chamber, June 29th, 1566, regulating the manner of printing ~~to a~~ number of preſſes, with additional penalties, ſigned by Sir Nicholas Bacon, Lord Burleigh, and all the eminent privy council of that age, ~~that the~~ above all forbid to print againſt ~~the intereſt of~~ any ordinances or commands of any ſtatute or law of this land, or of any injunction ſet forth by the Queen's grant or authority, ~~or by~~ another decree of the Star Chamber 1585, in the 28th of Elizabeth, in the 4th article are theſe words, "every book, &c. to be licenced, nor ſhall any one print any "book, work, or copy, againſt the form and meaning of the "ſtatute, or any injunction made by her Majeſty or privy "council, or againſt the true intent or meaning of grants, "or patents under the great ſeal, ~~or~~ the company of ſtationers." The proclamation of the 25th of September, 21ſt. James the I. 1623, recited the above decree of the 28th of Elizabeth; and that the ſame had been evaded among other things by pirating beyond ſea ſuch allowed books, works and writings as had been printed within the realm ~~or parliament, or~~ by ſuch, to whom the lawful authority doth appertain; and then this proclamation enforces the decree, ~~by~~ another decree of the Star Chamber 1637, article the 7th, theſe ~~are the~~ words, "No perſon is to print, or import "printed abroad, any book or copy, which the company of "ſtationers, or any other perſon, have or ~~ſhould~~ by letters "patent

"patent, order or entry in their regiſter books, or otherwiſe "(theſe words are very remarkable *), have any right au- "thority or allowance ſo to print". Theſe are all the acts of ſtate relative to this matter. There is no caſe of a proſecution in the Star Chamber for printing againſt licence, or printing any other man's property; moſt of the judicial determinations of the Star Chamber are loſt or deſtroyed. But it is certain, that down to the year 1640 copies were protected and ſecured from piracy by a much ſpeedier and more effectual remedy than actions at law or bill in equity. No licence could be obtained to print another man's property, not from any prohibition, but becauſe the thing was immoral, diſhoneſt and unjuſt; and he who printed without licence, was liable to great penalties. Mr. Blackſtone † argued very materially from the books of the Stationers Company: from the extracts of them it appears there was no order or by-law made till 1640; yet copies were entered as property, and pirators were puniſhed. The firſt was in 1636, the ſecond in 1638. In that year, and down from that time, there are entries of copies for particular perſons. In 1659, and down from that time, there are perſons fined for printing of other men's copies. In 1673 there are entries in the Stationers Company, becauſe we take notice of the ſale of the copy to the party. In 1682 there are entries with an expreſs proviſo, that if it be found another has a right to any copy, then the licence touching ſuch

* Many of the determinations of the Court of Star-chamber were not only remarkable, but in the higheſt degree oppreſſive and illegal, fatal to Liberty and a Free Preſs.

† The learned Judge Blackſtone was one of the counſel for the plaintiff in this cauſe.—In his excellent commentaries on the laws of England, he touches on the ſubject of Literary Property, but can find no foundation for a common-law right, or any other than that authorized by the ſtatute of Queen Anne; beſides, he has been ſo candid as to acknowledge to his companions, that there is no ſuch thing as common-law right in books, his own property (his commentaries) have been re-publiſhed in Ireland, and he has no redreſs againſt the publiſhers, as the ſtatute does not extend to Ireland, being a Britiſh ſtatute only.

copy

another

s books, which

^ by the Decrees of the Star Chamber

^ an Owner at this time

* "For that part, which preserves justly every
"man's Copy to himself, I touch not, &c. — Miltons
Prose Works, Vol. 1. p. 142.

"and the just retaining of each man his
"several Copy, which God forbid (very emphatical
Words) should be gainsaid. - Milton P.W. Vol. 1 p. 161.

copy ſhould be void. It is remarkable, that the decree of the Star Chamber in 1639, ſuppoſes the copy right to exiſt no otherwiſe than by patent, order, or regiſter in the Stationers Company, which could only be by common law *. In 1640 the Star Chamber was aboliſhed; the troubles began ſoon after; the King's authority was ſet at nought; all regulations, and the reſtraints of licence of printing by proclamation; the decrees of the Star Chamber given to the Stationers Company were deemed to be, and certainly they † were illegal. The libels then printed occaſioned an order, that nothing ſhould be printed but what were licenced; copy-right could only then be ſupported on principles of common law; both houſes take this for granted: The ordinances therefore for prohibiting printing without conſent of the owner; all books imported, printed abroad, were to pay a forfeit to the owner, or owners of the copy of the ſaid books. This proviſion in this ordinance neceſſarily preſuppoſes property to exiſt; it is nugatory, if there was no ſuch thing as an owner; this right only exiſted by common law. In November 1644 Milton publiſhed his famous ſpeech for the liberty of unlicenced printing againſt theſe ordinances, and among the caſes made uſe of to ſet aſide this. God forbid, he ſaid, it ſhould be, &c. ‡ ſo that the liberty of unlicenced printing ſhould extend to the buyer of theſe copies, and this would ſtand only in common law, theſe that are culled, and are againſt the publick licence. All agree that Literary Property was not

* Common Law, *is immemorial cuſtom*, but by this way of arguing, a patent right is explained to be a common-law right! Such abſurd reaſoning needs very little comment.

† After all theſe curious arguments have been brought in as auxiliaries to the determination about to be given in this cauſe, they are fairly acknowledged to be illegal, and the court itſelf aboliſhed.

[redacted]

‡ This being a Latin ſentence, the ſhort-hand writer could not underſtand it, ſo it is omitted.—Several inſtances of this occur afterwards.

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an effect of arbitrary power, but from law and juſtice, and therefore ought to be ſafe. In 1649 the Parliament made an ordinance, which prohibited printing any book, legally granted, without conſent of the owner on pain of forfeiture; the ſame obſervations occur in this laſt as in the former ordinances. The ſtatute of the 13th and 14th of Charles II (the licencing act) prohibits printing any book unleſs firſt licenced and entered in the regiſter of the Stationers Company; it alſo prohibits printing without conſent of the owner by paying a forfeit, half to the King, and half to the owner, to be ſued in ſix months; beſides being otherwiſe proſecuted as being an offender againſt the act. The act ſuppoſes an ownerſhip at common law; and the act itſelf is particularly recognized in the laſt ſection in the act, whereby the chancellors of both univerſities are forbid to meddle with any books, the right of printing whereof does ſolely and properly belong to particular perſons. The ſole property of the owner is here acknowledged in expreſs words as a common right, and the legiſlature who paſſed that act, could never entertain the moſt diſtant idea, that the productions of the brain were not the ſubject matter of property. To ſupport this ownerſhip, it muſt be proved, or the action could not be received; but the action is to be brought by the owner, who is to have a moiety of the penalty. But circumſtances ariſe from diſputing property, ſometimes between the author and the King, and ſometimes between different patentees of the crown, which occaſioned thoſe parts to be agitated in Weſtminſter-hall. The firſt on this ſubject was that of Atkins, againſt ſome members of the Stationers Company, 18th Charles II.; it is reported in Carter 89; the plaintiff claims a right under the patent; the defendant had printed Rolle's Abridgment; the bill was brought for an injunction, and my Lord Chancellor awarded an injunction, not only againſt the defender, but every member of the Company; on that the defendant appealed to the Lords, and the decree was affirmed. This was argued on the footing of a licence to a copy-right from

from the crown for all law books; becauſe, it was urged, the laws are the King's laws. I don't enter into the reaſon of the determination: The Lords went on this footing, that a copy-right was a thing acknowledged at common law; then they argued, that the King had this right, and had granted it to the plaintiff as patentee. In this light this caſe was properly ſtated by Mr. Blackſtone, and argued from as a caſe in his favours. The next is mentioned in Skinner 234, and alluded to in the Firſt Modern 257, that came on in this court, when Lord Chief Juſtice Hale preſided, in Michaelmas term the 24th of that King. Roper had bought from the executors of Mr. Juſtice Croke the third part of his reports: Stringer was a law patentee, and it was reprinted without the patentee's conſent: Roper brought an action of debt on the licencing act: Stringer pleaded the King's grant; on which the plaintiff demurred: It was adjudged in this caſe for the plaintiff. This is a judicial authority in point, that the plaintiff, by purchaſe from the author, was the owner of the copy by common law *; nor does the reverſal in the Houſe of Lords, the 26th of May 1705, at all ſhake this authority; becauſe the reverſal proceeded as in the caſe of Atkins, on the opinion that the copy belonged to the King. Beſides it appears, the judges were not aſked their opinion; and probably they would not have concurred, becauſe the majority of the Houſe of Lords would not hear their opinions; for it is ſaid in the journals, after a ſerious debate, the queſtion was propounded, whether the judges ſhould be heard in this caſe; it was reſolved in the negative; againſt which reſolution Lord Angleſey proteſted. In the argument, in the caſe of the Company of Stationers, reported in Skinner 234, it is ſaid, it is true the action of Roper and Stringer was brought in the 14th Charles II. and that the ſtatute did not give a right, but only an action of debt. The next caſe is the Company of Stationers againſt Seymer, which came on the 29th of Charles II., reported in the Firſt Modern 256; the plaintiff, as grantee

* This point is fully anſwered by the following opinion of Judge Yates.

of the crown, brought an action againſt the defendant for printing Almanacks. Pemberton ſaid, when ——— was Chief Juſtice in this court, there was a queſtion aroſe concerning the liberty of printing of particular books, with a prohibition to all others from printing the ſame, how far it ſhould be good to thoſe who claim a property paramount the King's grant; but, ſays he, the defendant in your caſe makes no title to the copy, only he pretends a nullity in our patent. The book the defendent has printed, has no certain author; and then, according to the rule of law, the King has a property in it, and by conſequence may grant his property to the company. The court thought almanacks might be prerogative property; the court ſaid, thoſe prognoſtications do not alter the caſe any more than if a man was to claim a copy by ſome little alterations of his own. Theſe were times, when the prerogative ran high; though it was then well known that copy-rights were received; tho' the right of the crown was adjudged ſometimes, as in this caſe, to over-rule private right. The licencing act expired the 9th of May 1679, 31ſt Charles II. Soon after that, there is a caſe mentioned by Lord Coke's entries 67, actions in the caſe; for printing the Pilgrim's Progreſs, of which the petitioner was, and is the true proprietor; whereby he loſt the benefit of his copy. I don't find this action was proceeded in. The licencing act, which expired in 1679, was repealed the firſt of James II: It was continued by the 4th of William and Mary; and finally expired in 1694. For five years ſucceſſively, after the expiration of this act, attempts were made for a new licencing act: A bill once paſt the Houſe of Lords; but it miſcarried in the Houſe of Commons, they objecting to a publick licenſer. The ſtationers applied in 1703 for a bill to protect their copy-rights, which had been ſo long ſecured by penalties, and had no idea, but a bill in equity could be obtained, but by letters-patent, which were judged illegal, an action on the caſe was thought of. I mention-

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ed before that of — plaintiff and — defendant, which was not proceeded in. In one of the cases in 1709, in support of their application for a bill, the last reason is as follows: "The liberty now set on foot for breaking through this ancient and reasonable usage, is no way to be effectually restrained but by act of parliament; for by common law the bookseller can recover no more costs than he can prove damages; and it is impossible for them to prove the tenth, nay the thousandth part of the damages he suffered; because many thousand different copies may be dispersed all over the kingdom, and he not be able to prove a hundred of them; because the defendant is always a pauper, and no man of credit will appear in this case: Therefore the only remedy at common law is to confine him to the King's-bench, and there he may continue the evil practice with impunity. We therefore pray the confiscation of counterfeit copies to be one of the penalties inflicted upon the defendant." Pursuant to an order made in the bookseller's petition, a bill was brought in for securing the property of books to the owners. In September 1709; on the 21st of February, the bill was reported with amendments. I shall consider the bill as passed into a law, and the arguments made use of in the course of its passing the House of Commons. The Court of Chancery from that time to this day have been in a great error *) if the whole right of an author depends on this positive act as introductory to a new right; for it appears the property of no book is intended by that act to be secured unless it be entered. No body contends against the act of Queen Anne unless the book be entered; and yet it is held unnecessary to be proved in the Court of Chancery, that the book is entered. It is enacted, that all suits, bills, &c. that a suit commenced on the act shall be brought within three months after the offence committed. If all copies were

* This is a very modest assertion of a judge, only of a few months standing in the King's Bench, to arraign so many Chancellors, and to suppose, that he and his brethren of the K. B. ONLY had the faculty of discovering the true meaning of this statute.

open and free after paſſing this act, pirating is only an offence againſt the ſtatute; yet it is neceſſary in chancery that the bill ſhould be brought within three months after the offence firſt committed. If this act be right *, no method of proſecution can be purſued but that preſcribed by this act. There is no ground on which this juriſdiction has been exerciſed by the Court of Chancery, on which it can be ſupported, except the antecedent property of the author, confirmed and ſecured for a limited time by this act. In this the entry of the book is limited by the ſtatute penalty only; but the remedy by an action on the caſe, or by a bill in chancery, which is the conſequence of a common-law right, it is not affected by the ſtatute proviſion or limitation.

Mr. Murphy ſtated and laid great ſtreſs on the caſe Millar, Collins and others, in the Houſe of Lords, 1750. In that caſe, which I ſhall ſtate very particularly, ſuits were brought on the 8th of Queen Anne, and 12th of George II. by ſeventeen bookſellers of London, plaintiffs, againſt twenty-four bookſellers of Edinburgh and Glaſgow defendants, for having offended againſt theſe two acts, as to many books ſpecified in the bill. The firſt interlocutor that paſſed, was on July 17, 1746, where the court find, that there lies no action for damages in this caſe. The plaintiffs petitioned for a rehearing, and inſiſted that the 8th of Queen Anne gave an additional ſecurity by penalties during the limited term to the properties that exiſted before; therefore that act was declaratory of an antecedent property, and that the Court of Chancery has always underſtood it in this ſenſe. On the ſecond hearing, the court, by their interlocutor of the 4th of September 1746, find an action of damages lies to the extent of the profits made by the defendants for ſuch of the books as had been entered in the ſtationer's regiſters, and reprinted in Britain. To the ſaid interlocutor the defendants prayed a review; the court ordered it to

* If the act is wrong, it ought to be repealed by parliament, but it cannot be diſpenſed with by a court of law, let the judges be ever ſo wiſe.

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be re-argued, and directed the counſel to conſider, whether by the laws of Scotland an action laid for damages by the ſtatute of the 8th of Queen Anne. Both ſides avoided the argument on the caſe of common law: The plaintiffs were perhaps adviſed againſt putting their caſe on the common law of Scotland, becauſe they were printed in London, and therefore might come under the term of foreign books. The defendants inſiſted the action was brought on the ſtatute; and therefore they could not refer to common law. The court by their interlocutor gave no opinion as to common law, but find that no action lies on the ſtatute for offences againſt the ſame, except when it is brought within three months after the committing ſuch offence; and that no action lays except for ſuch books as had been entered in Stationers-hall according to the ſtatute; and that no action for damages lays on the ſtatute. The plaintiffs prayed a review, and objected to the ambiguity of the propoſition, That no action for damages lays on the ſtatute; becauſe they did not contend that ſuch an action was given by the ſtatute, but that it followed the antecedent property; and again, by their counſel, argued the practice of the Court of Chancery. The court by their four interlocutors find, that no action for damages does lay upon or in conſequence of the ſtatute, but only for the penalties. The plaintiffs from theſe interlocutors applyed to the Houſe of Lords, and in their reaſons annexed to the printed caſe they ſtate, the Court of Chancery, —————— the 8th of Queen Anne, and the penalties thereby given for a limited time for an additional ſanction only to preſerve property. And in another part of the reaſons, the appellants inſiſted that it is like the caſe of a patent; the patentee in conſequence of his property is intitled unto the ordinary relief in the courts of law and equity. It is remarkable that the reſpondents counſel, who were able men at that time, don't ſpeak that the ſtatute were to be conſidered as giving an additional ſecurity; they only ſay, it is taken as an action on the caſe, it cannot be joined with an action for the penalties,

nalties, and inſiſt in their reaſons. They object to the mode of proceeding, and ſay, that the plaintiffs would not recover damages in this action. M. Ramſay in this caſe ſays, that Lord Hardwick ſpoke to this effect, that the ſtatute of James I. which took away monopolies, at the ſame time gave the king a power to grant patents for the encouragement of new inventions for fourteen years. Theſe patents were inrolled in chancery, and the court on complaint of patentee would take notice of this record: the ſtatute of Queen Anne muſt be conſidered a ſtanding patent to authors, and the court will give relief. But my Lord Hardwick doubted whether that was declarative of the law, or a new law to give men a right they had not before. He ſaid, on this account it was neceſſary to conſider how the common law ſtood in Scotland: he ſaid, as the queſtion could not be determined on the preſent appeal, it would ſtill be open. This account of what Lord Hardwick ſaid, is taken from a letter ſaid to be wrote to the reſpondents in Scotland from their ſollicitor, and it plainly contains what the ſollicitor thought would make moſt for his clients. Lord Hardwick muſt have intimated more of his opinion than was hinted in this letter *, by his ſaying, he would not be underſtood to give his opinion, which would be binding himſelf. The only queſtion before the houſe by the appeal was, whether any remedy would lay in conſequence of the ſtatute, except for the penalty. Lord Hardwick takes the doubt to be, whether the ſtatute was declaratory of common law, or introductory of a new law to give men a property they had not before. He ſtates no doubt whether the remedy would lay, except for the penalties only, if the act gave a new copy-right, the doubt was a queſtion on the ſtatute not to be reſolved by ———, and there is an expreſs proviſo againſt inferences any way †. The que-

* He did ſay as much as made the counſel for the London bookſellers, Mr. Murray (now Lord Mansfield) and Mr. Lockhart, adviſe their clients not to litigate the matter further, as it would likely be determined againſt them in favours of the Scots bookſellers; which advice they wiſely followed.

† All this reaſoning is by inference; yet the learned judge acknowledges ſuch inferences to be illegal, but ſtill goes on to uſe them.

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for the Objections

ſtion is, whether the property exiſted by common law; if it did, the act preſerves it and ſecures it by penalties; if it did not, the act gives a new right conditionally under the ſanction preſcribed; therefore, ſays Lord Hardwick, it is material to conſider how the common law ſtood before the ſtatute. As to what he is reported to have ſaid, how it ſtood in Chancery, the ſolicitor muſt have omitted ſome thing, for Lord Hardwick could not allow of any decree becauſe it was inrolled in Chancery, merely becauſe it was an award of a higher nature, without mentioning a word on what the Court of Chancery proceeded. The printed reaſons argued on the licence given to patentees for a uſeful invention, ſuppoſing a common-law property claimed for a term: this legal right ſtands on the ſame ground with any legal right except the 23d of James I. But ſuppoſing a priviledge given to the author to ariſe out of a new right, in letters patent, all the conditions required by the 21ſt of James I. muſt be obſerved. Patentees for new inventions are left by the ſtatute of the 21ſt of James I. for common law and their remedies follow with reſpect the nature of their right: but the 8th of Q. Anne is a penal ſtatute, which preſcribes the remedy, and the mode of proſecution: the action is to be commenced in three months. On ſuch an action, if the right ariſing on the prohibition be new, no remedy or mode of proſecution can be purſued except what is directed by the act, which gives to the Company a ſole right of trade; the trade was free before; conſequently theſe ſtatutes created a new offence. Now is it ever imagined that any remedy could be purſued by the Eaſt-India Company, but theſe preſcribed by the act? The penalties are by way of ſecurity; but where a particular portion ariſes out of it, and gives a new prohibition, there is no other method of proceeding, but by the modes preſcribed therein. If a conditional right is created by act of parliament; the condition cannot be diſpenſed with; if the ſame that makes the right, limits the time in which

which the profecution ſhall be commenced, it cannot be diſpenſed with; therefore the whole juriſdiction exerciſed in Chancery, againſt the pirators of copies, is on the right authors have on that act, which is a temporary ſecurity. It can ſtand on no other ground, and I am perſuaded that Lord Hardwick dropt ſomething that paſt in the Court of Chancery which is omitted here. The order of the Houſe of Lords declares, that the action brought by the appellants in the Court of Seſſion in Scotland, was improperly and inconſiſtently brought, by demanding at the ſame time a diſcovery and accounts of the profits of the books in queſtion, and alſo of the penalties of the acts of Parliament, which the appellants had never abſolutely waved in the proceedings in the courts below; and alſo by perſons claiming different rights in books in the ſame queſtion; and therefore rights determined by the ſaid interlocutors could not come in queſtion in this caſe*: and therefore the Lords ordered that the interlocutor ſhould be diſmiſſed without prejudice to the parties on either of the ſaid points; and it was ordered by the Lords, that the Court of Seſſion do proceed accordingly. If the ground of relief in Chancery during the term given was an antecedent property, it is not to be wondered, that, after the expiration of the term, the Court had no difficulty to grant the ſame relief on the common-law right.

Before I go any further, it will be proper to premiſe what will put the Court of Chancery on its proper footing: Injunctions to ſtay books printing, are on the ſame grounds of injunctions to ſtay waſte. On moving the Court, the right muſt be ſtated by affidavit; the right muſt be admitted by anſwer, or denied. Where the plaintiff's right is queſtioned and doubtful, an injunction is improper; becauſe no reparation can be made to the defendant for the damage he ſuſtained by the injunction; but if the defendant proceeds

* To do juſtice to the learned judge he is right in this aſſertion; theſe cauſes were ſo blended together, that a judgment could not conſiſtently be then given againſt the perpetual monopoly now claimed.

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to make waſte, the plaintiff may have damages. If the defendant acquieſces under the injunction, it is ſeldom worth the plaintiff's while to proceed for an account, the ſale of the edition being ſtopt. From the year 1709 to this day, there has not been more than two or three ſuch caſes brought to a hearing. The proceedings on common-law right could not ariſe in 17[illegible]; the ſooneſt they could ariſe was after the the 10th of April 1731. On the 9th of June 1735, in the caſe of ~~Aaron~~ Walker, concerning which I have conſulted the regiſter, Sir Joſeph Jekyl granted an injunction to reſtrain the defendant from printing the Whole Duty of Man, which aſſignment had been made ſo long as December 1637; and this was acquieſced under. On the 17th of November 1735 an injunction was granted in the caſe of Mott againſt Faulkner for printing Pope and Swift's Miſcellanies; many of theſe pieces, particularly the Conteſt, the ~~Deciſions~~ between Athens and Rome, which were publiſhed in 1701, and ſeveral others that were publiſhed in 1701 and 1702 *. The counſel preſſed ſtrongly the objection to theſe pieces, that had been printed ſo long as not to be preſerved by the act of parliament; but Lord Talbot continued the injunction to the whole, and it was acquieſced under afterwards. Faulkner the defendant, in that caſe, was a man of ſubſtance, but he was adviſed not to litigate it further. On the 27th of January 1736 ——— againſt Walker, Sir Joſeph Jekyl granted an injunction for printing Nelſon's Feſtivals; tho' the Bill ſets forth, it was printed in the life-time of the author, and the firſt publication of this book was in

* The fact was, that the greateſt part of theſe miſcellanies were within the time limited by the ſtatute. Afterwards, in the caſe of Bathurſt againſt Donaldſon, Lord Chancellor Northington removed the injunction, and declared, as the monopoly was out according to the ſtatute, he would not hinder the defendant, Donaldſon, to print and re-publiſh as many of Swift's Works as he pleaſed. As to what is aſſerted of Faulkner being adviſed not to litigate the matter further, this is all *gratis dictum*; if the common-law right was ſo clear as is here pretended, why did they not proſecute Faulkner in Ireland, as he has from that day to this, continued to publiſh and vend Swift [See Dean Swift's own opinion on this ſubject, in one of his poſthumous letters.]

1703, and he died in 1714, and these injunctions were acquiesced under. In May 1739, Tonson against Walker, an injunction was granted to restrain the defendant from printing Milton's Paradise Lost; the plaintiff enjoyed an assignment from the author as long ago as 1637. The injunction was granted by Lord Chancellor, and acquiesced under in 1752: The bill was filed in 1751, suggesting the defendant had advertised to print Paradise Lost with the life by Fenton; and the bill suggests a pretence that the plaintiffs had a right to it; they built their right to it as in the other case: the other assignment was published about 1688, and the plaintiff derived his right and title to the life by Fenton, which was published in 1727, and to Bentley's notes, and Dr. Newton's notes published in 1749*. To this case the answer came in the 12th of November 1751, and the defendant insisted on a right to print the work in numbers, and to take in subscriptions: it was intended to take the opinion of the court; a decree was occasioned, and no motion made till near the end of April 1752: the injunction was moved for Thursday 23d of April, and it was argued at large on the general ground of copy-right by common law: Lord Chancellor directed it to be spoke to on Saturday by one on each side, and afterwards it stood over to Thursday: It was argued very diffusively by Lord Mansfield for the plaintiff, and by Sir Thomas Parker for the defendant. The notes of the last edition, which were published in 1749 were in that act; but an injunction as to them only would have been of little avail: It did not follow that the defendant should not be permitted to print what they had a right to print, because they had attempted to print more; for in Pope and Curll, Lord Hardwick enjoined the defendant only from printing the plaintiff's let-

* All these cases of Injunctions are fully answered in the annexed argument of Sir Joseph Yates. Injunctions are generally granted on a motion of the plaintiff, and often without waiting for the defendant's answers; they are to stop the sale till parties are heard, and are no proof whatever of a common-law right.

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ters; and there was a great many more letters in that book the plaintiff had a right to object to. If the opinion of Lord Hardwick had not been ſtrongly for the plaintiff, he would not have granted his order for the whole; ſo that printing the poem publiſhed in 1637, or the life by Fenton, or Bentley's notes publiſhed in 1732, and Newton's notes, would have been abridged. The Lord Chancellor put his order in the injunction, ſo as to include an injunction as to Milton's works, the life by Fenton, and Bentley's and Newton's notes; whereas Newton's notes only were within the ſecurity of that act *. The injunction is not barely to the ſelling of the books of which Newton's notes made a part; but to the future printing. He probably foreſaw he ſhould never hear of it again; the parties underſtood his way of thinking, the defendant acquieſced in the injunction, and he made it perpetual: and they would now be guilty of a breach of this injunction, if they printed Milton without either of the notes, or the life by Fenton. I do inſiſt on this caſe, (excepting the order made by Lord Hardwick) he guarded againſt being thought finally to determine the queſtion †: he cited the ſtationers company againſt Partridge, where the caſe was doubtful; he obſerved Dr. Newton's notes either tranſcribed or colourably abridged. The ſtrongeſt authority the judges have cited is in the caſe of Seymore in the argument of prerogative copies: the diſtinction is taken on the ground of the King's right in the common-prayer book, ſaid,

* This argument is fully anſwered by Sir Joſeph Yates, who ſays, that in this caſe Lord Hardwick granted the injunction merely on account of Doctor Newton's notes, which were clearly within the time limited by ſtatute. *See Judge Yates's opinion annexed.*

† So far from the queſtion's being finally determined, and ſo little faith have the London bookſellers in this doctrine, that ſince that very period, there has been perhaps a ſcore of different editions of Milton's Paradiſe Loſt, printed both in Scotland and England, without any liberty from thoſe *gentry* who ſtile themſelves Proprietors of that work; and it is believed they dare not try a queſtion even for this article, which this learned judge and his two colleagues think to be ſo concluſive.

&c. This argument being uſed to ſupport that right in the crown, is aſſerting ſuch a property to exiſt. In the caſe of Baſkett againſt the univerſity of Cambridge, it would not have been agreeable to Lord Hardwick's decency, to have ſpoke out fully againſt a right grounded on common law. The queſtion of literary property was brought before the court in the caſe Tonſon and Collins, and after two arguments was adjourned to the exchequer chamber; they had been informed on good authority, ſo far as the court inclined to an opinion, they were in favour of the plaintiff *; but as they thought there was colluſion in the caſe, a judgment in favour of the plaintiff would not have been acquieſced under. On this ſuſpicion, and becauſe the court were inclined to the plaintiff, it was ordered to be heard by all the judges: afterwards, on certain information received by the judges, that the whole was a colluſion, that the whole was nominal only, and the expenſe paid by the plaintiff, they refuſed to proceed in the cauſe; though it had been argued very ably by the council in behalf of the defendant. The judges thought this was an attempt of a dangerous example, and therefore ought to be diſcouraged. The tendency of theſe cauſes are publicly known, but the reaſons of their diſcontinuance are not. A doubt aroſe in Chancery; and, in the caſe of Millar and Donaldſon, an injunction was refuſed without any opinion; Lord Northington ſaid, it would be preſumption in him, and he would ſay nothing to the merits. Under theſe circumſtances I think his Lordſhip did right to refuſe the injunction †; and no judge ever granted ſuch an injunction to ſtay waſte on the injured property, and

* This ſeems to be a very unfair ſtate of the caſe, for by all accounts, a great majority of the judges were clear againſt the perpetual monopoly here pled for.

† This fact is alſo groſsly miſrepreſented: The book in queſtion was Thomſon's Seaſons, for which Millar at firſt obtained an injunction in the uſual way, without the defendant's being heard, but on giving in anſwers, and ſhowing that the monopoly was expired, the injunction was removed, and the defendant left

Osborne and Donaldson

Harcourt

and continue hearing, where the whole fact was admitted, and he doubted in his own mind the plaintiff's right, and to what end could the injunction be granted, and the matter might be ſent to law directly? The Stationers-company and Partridge, which came on before Lord Cowper on the 9th of February 1709, is no reaſon to the contrary; for Lord Cowper continued the injunction on the ground of the plaintiff's right being clear. Their patent to print almanacks had been adjudged at common law, and granted them. In the caſe of the ſtationers company againſt Lee 1681, and the ſtationers company and Wright, 17th of November 1681, then Lord Cowper inclined ſtrongly for the plaintiffs, or he never would have injoined a work that was annual, and ſerves only for a year. There is no report of this caſe of what paſſed on motion before Lord Cowper; But the queſtion, interlocutors, and the former determinations having been before the reſolution, when this matter came on before Lord ———, the ſame caſe of the ſtationers company, he thought it prudent to take the opinion of this court. This is ſtated in Lucas's reports: this caſe ſo far adds great weight to the former precedents, where judgment had been granted after the expiration of the term; becauſe it ſhews no doubt was entertained in this matter. In the year 1752, the queſtion again depending in this court, I am perſuaded Lord Hardwick would not have granted an injunction from decency, let the caſe be ever ſo ſtrong. The argument with reſpect to the property of crown-copies has ſince prevailed; and it has been ſolemnly adjudged, there are copies of which the King is proprietor. The court had no idea, that the crown had power to reſtrain printing, which is a trade or manufacture; or to grant excluſive printing of any book whatſoever, except by reaſon of the

left at liberty to print as many copys as he pleaſed, which he has availed himſelf of; it is alſo remarkable, that Millar who was abundantly acute, did not attempt to proſecute farther this cauſe with Donaldſon, but choſe, for reaſons that are obvious, to try the ſame queſtion and for the very ſame book with Taylor, which is now the ſubject of this *famous* deciſion.

copy

its copy being his property: the court, in that case, agreed with justice Powell, ~~so~~ in the case of Partridge, you must shew some property in the crown. Mr. Yorke argued it upon this ground. It is settled then, that the The King is owner of ~~all~~ copies, and writings, which he had the sole right originally to publish; as in the acts of parliament and common prayers, &c. &c. these are his own works, State as he represents the case. So by purchase he had a right to publish, as in the case of the Latin Grammar, and the year-books; and in these two last cases, the property of the crown stands on the same footing as private copy-right: as to the as year-books, because the crown ~~were~~ at the expense of taking the notes; and as to the grammar, because the King payed for the composing of it. The only doubt as to the judgments of the House of Lords, on Roll's abridgment and is, neither Croke's reports, if that ~~no other~~ collection were made by the authority or expense of the crown; and that the King had no right of original publication. The courts of Westminster hall had the sole right and authority of publication of their own proceedings. Lord Hardwick had before this held, that the original right of publication gave the copy. In the case of the sessions paper, Manby and others against Owen and others, ~~it was~~ brought by the printers who had bought the copy of the Lord Mayor, the Lord Mayor had appointed the printer of the trials, he being the first in the commission, and took a pecuniary consideration for it: The Lord Chancellor thought, the right to print gave the plaintiff a property; and granted an injunction; which was acquiesced ^ Sole under. If the author has ~~sold~~ a right to make the first pub- ^ But lication, I can't consider his case analogous to the crown-copies, or trials in the sessions paper. Suppose a man, with or without leave, procures a copy, and publishes it; it is not trespass, it is not a crime indictable, it is not the property of the author; the original copy remains; but it is a gross violation of the author's ~~right; it would be a violation of authors~~ common-law right. This was never doubted. In the case of Webb against Rose, in 1732, a bill was brought

by

of all Books

's Representatives

– viz. Millar & Taylor,

by the ſon of Webb the conveyancer, againſt the clerk, for intending to print his father's draughts; Sir Joſeph Jekyl granted an injunction; it was acquieſced under. In the caſe of Pope and Curll, Lord Hardwick granted an injunction as to Pope's letters to Swift; Lord Hardwick thought, ſending the letters transfer'd the paper on which it was wrote, and every uſe of the contents, except the liberty and property of publiſhing, where conſent is not proved, the negative is imply'd as a tacit condition. In the caſe of Shebeare, an injunction was granted by Lord Northington, They produced the two volumes of Clarenden's hiſtory; the ſon inſiſted he had a right to print and publiſh; but the court were of opinion Gordon had a right to make what uſe he pleaſed of it, except publiſhing. This injunction was acquieſced under; and Lord Clarendon recovered a large ſum of Mr. Gordon, for apprehending he had a right to print his book, when he had not. The caſe of Foſter againſt Waller the bookſeller, the third of June 1741, an injunction was granted againſt Waller for printing the plaintiff's notes without his conſent. From whence it is clear, that there is a time, when without any poſitive ſtatute, the author has a property to the copy of his own works, in the ſtrict legal ſenſe of the words.—But in this caſe, the author has aſſerted and vindicated his property in the copy. Conſent to leave it open, or to make a grant of it to the public, is a fact to be proved; in this caſe, it is not ſo much as pretended; but the defendant's counſel inſiſted, the author's communicating it to the public, is leaving it open, * the ſame as the patentees ſhewing his invention: the alluſion holds only here, by communicating the manufactory, or ſcience, men are taught the art and ſcience, and have a

* All theſe caſes of injunction are fully and clearly anſwered by the annexed opinion of Sir Joſeph Yates, they are here ſtrangely jumbled together without any order whatever, and may paſs for proofs of what is here ſo much laboured, viz. to eſtabliſh a common-law right; but ſuch who will thoroughly examine them, will find that they operate quite the other way.

right

right to uſe it; ſo all the knowledge that can be acquired by the ſenſe of the book, is free for every man's uſe: if it teaches mathematicks, if by examining an epic poem, a man learns to make an epic poem, he has a right to uſe it: a literary compoſition is the materials, and the materials is all the property the book conveys, unleſs inſtruction, or entertainment: the multiplying of copies in print is quite a different thing to the ſcience the book teaches. In the 43 of Elizabeth, and 21ſt of James the I, monopolies were the ſubject of much diſcuſſion, copies of literary books were prohibited, and were never thought to be like a trade or mechanical inſtrument. But if copies become open, it muſt be ſo as to the crown copies likewiſe; From the contrary, which is now ſettled, I cannot diſtinguiſh between the King and a common author; for I preſume he has no right to reſtrain the preſs; I am authoriſed by the caſe of Baſkett and the univerſity of Cambridge, though I do allow an author's conſent to leave it open may be implied from circumſtances.

I come to the ſecond queſtion ariſing from the 8th of Queen Ann, though I have in a great meaſure anticipated the argument. Mr. Murphy ſtrongly inſiſted, that by changing the title, &c. the parliament were led to declare, there was no property at common law. The ſenſe or meaning of the act of parliament muſt be taken from what was ſaid when they paſſed it into law, not from what has been ſaid of it ſince. On the face of the act. The very preamble ſtrongly implies a declaration of the property at common law, for it ſpeaks, "Whereas of late," that is, ſince the determination of the licenſing act, "the liberty has "been taken by divers perſons of printing, reprinting and "publiſhing, without conſent of authors and proprietors, "to their very great detriment, and often to the ruin of "themſelves and families *."

Then

* This way of reaſoning by inference is very curious, and may prove any thing whatever; but any perſon who will look into the folio journals of the houſe of commons 1709-10, will find good reaſon to be of a different opinion from this

Then the act goes on, "to prevent such practices for the future." Now every word in the act is emphatical, and deserves to be remarked upon. Could the legislature mean when they speak of the liberty, taking the assumption of a new right, then the preamble would have run thus; Whereas booksellers and authors have of late gain'd the right of printing and reprinting, &c.: now the word *reprinting* deserves this observation; for if the printing was at first a gift to the public, it could be no injury to print a second edition without the consent or licence of the author and the assignee; thereby pointing out two sorts of persons entitled to the copy, the original author, and the assignee, the person to whom it is assign'd. I might here speak of the words, "*so often to the ruin of themselves and families*;" the parliament might allude to the disposition of authors at their decease to their families; but I chuse to go to the first words, "*to prevent the like practice for the future*;" did the parliament mean to prevent a legal exercise, which the publication of books would be, if there was no such thing as a copy-right? The word *practice* is properly applied to the doing illegal acts, but is incongruously made use of to describe acts that are strictly legal or doubtful, not to go into the history of the changes the bill underwent in the house of commons; it certainly went to the committee, as a bill to secure an undoubted property in the copy for ever *. It is plain, an objection arose to the generality of copies, by the law and usage of parliament, a new bill cannot be made in a committee; a bill to secure the property of an author, could not be turn'd into a bill to take it away; and therefore not to be supported, though there are no proviso's in their

this learned judge, the whole transactions previous to passing this bill are there mentioned. The act itself is annexed to this publication; let any candid person read it carefully from beginning to end, and then judge for himself.

* There is not perhaps a single person in the kingdom, (the three judges of the K. B. and the booksellers excepted,) that believe this statute can give a perpetual monopoly and even many of the candid London booksellers own they have no such belief.

right: the words "*no longer*" add to the ſenſe no more than they would to a will if the teſtator gave for years; and probably theſe words "*no longer*" occaſioned an expreſs proviſo from the anxiety of the univerſity members who knew that they were poſſeſſed of many copies: the univerſity had publiſhed Lord Clarendon's hiſtory five years before it had the property of a copy. Great ſtreſs has been laid on the word *veſting* *. *Veſting* for a term does not import there is common-law right; if it did, the title is but once read, and if there could be no proviſo, it could not reſtrain the body of the act; but it ſpeaks of the copy intended to be ſecured to the proprietor. But the proviſo, as the common-law right, is as full as it can be drawn; "Provided this act ſhould not extend to the prejudice of any right of the univerſity, that any perſon or perſons have, or claim to have, to the printing or reprinting any copy that is printed already, or may be hereafter printed," which was a right to books printed already or hereafter, by the common-law right? Without this proviſo it might fairly be argued, that there is nothing could reſtrain the author's right: it is an authority that never was in idea, that this act is decided againſt the property of authors. I have avoided a large field of ingenuity, that was argued by the counſel at the bar, a piece of ground in the imaginary ſtate of nature, is too wide; the compariſon does not hold between things which have a phyſical and a literal exiſtence. It is certainly inconſiſtent, that the ſtranger ſhould reap the benefit of another man's labour; and it is wiſe in any ſtate to encourage letters, and painful reſearches of learned men; the eaſieſt and moſt equal way to decide, is to ſecure them the

* This word *Veſting*, which with the two little words *no longer*, although very material, are here reckoned of little or no weight, becauſe they happen to run counter to the whole of this learned judge's argument. The right by the ſtatute is *veſted* for 14 or 28 years and *no longer*; but by a new interpretation *no longer* is made to ſignify *for ever*: This reaſoning is as juſt, as to infer from the verdict in the caſe of Woodfall guilty of the *whole charge*, although the jury have found publiſhing ONLY.

property

What
to be printed, but a

in proportion

property of their own works; no man contributes that is not willing; and though a good book may be run down, and a bad book may be kept up for a time, ſooner or later the proportion of the reward will be to the merit of the writer. He who engages in a laborious work, ſuch for inſtance as Johnſon's Dictionary, might employ his whole life, and do it with more ſpirit, if not only it might conduce to his own glory, but a proviſion for his family *: I never heard any objections, except enhancing the price; this judgment will not prevent a judgment againſt a perſon for enhancing the price: a proprietor might be induced to print a fine copy; a ſmall profit on a large ſale is much more beneficial, than a large profit and a ſlow ſale of a leſſer number.

Upon theſe reaſons, I am of opinion that there is a common-law right of an author to his copy, and that *judgment* ought to be for the plaintiff †.

* No liberal mind will deny, that an author ought to have a proper recompenſe for his labour; but why a perpetual excluſive monopoly? On the other hand, no bookſeller can complain if he enjoys the monopoly which is granted by the ſtatute; beſides it would be taxing the whole kingdom to enrich a few over-grown Printers and Bookſellers.

† This judge, Mr. Willes, was formerly counſel for the defendant in this very cauſe, and was once of a very different opinion from that now delivered. It is ſaid he declined long to give judgment in this ſuit, but that the CHIEF wanted much to have all his brethren to join him in ſupport of this amazing diſcovery, which he happened to make, and which had not been obſerved by any perſon in the three kingdoms but himſelf! It ſeems to be of a piece with his late charge to jurys, not to find the *crime* but only the *fact*.

Mr. JUSTICE ASTON *.

THIS case of Miller and Taylor has been so often, so fully and so ably argued; and citations, histories, decrees, ordinances, statutes and precedents in Westminster-hall have been stated so accurately, both in point of time and substance; and the whole argument has been gone through so largely and so elaborately by my brother Willes, that I could content myself in conscience, as well as opinion, for to let the whole rest there; but, in point of form, I must proceed, I shall content myself with alluding to those authorities, as now fully and precisely known, without stating any of them over again at large, which I should have occasion to take notice of. The great question in this case is a general one, How the common-law stands independent of the statute the 8th of Queen Ann, in respect to an author's sole right to a copy of his literary composition? The material facts to introduce that question, found by the special verdict, are. That the book, entitled *the Seasons*, was an original composition, by James Thomson, and it was printed and published by him for his own use, as the proprietor thereof, at several times, from the beginning of the year 1727, to the end of the year 1729; it was never before printed any where else; that the plaintiff in the year 1729, purchased this work of the original author and proprietor, for a valuable consideration; that the plaintiff at that time printed and sold this work as his property; and has ever had a sufficient quantity of the work for sale at a reasonable price; and that the defendant, without the plaintiff's leave or consent, has published and sold several copys of this work, which were printed without the plaintiff's consent;

* The reader is referred to the notes subjoined to the former opinion, as they are not repeated here, although the same articles often occur. The next opinion, that of Sir Joseph Yates, is a full, satisfactory and compleat answer to them both.

so

ſo that taking it affirmatively and negatively, it is expreſsly found that it was printed without his conſent, and it is not found, that it was ever made common and given to the public; therefore there is no room for implying a conſent by any argument whatſoever: by this verdict then the original property in the work, and publication of it by the author, the transfering of it to the plaintiff, the identity of the work, and eſpecially the copy, ~~which expreſsly makes uſe of the author and publiſher of that work,~~ and ~~from~~ its continuing in the author and plaintiff uninterruptedly * to the defendant's innovation of that property, is found. The queſtions I ſhall make are, firſt, whether an author's property in his own literary compoſition is ſuch, as will intitle him, at common-law, to the ſole right of multiplying the copies of it. Secondly, ſuppoſing he has a property in the original compoſition, whether copy-right by his own publication of the work, is neceſſarily given away, and the conſent of ſuch gift applied by the operation of the law, manifeſtly againſt his will, and contrary to the finding of the jury. Thirdly, whether it is taken away from him, or reſtrained, by the ſtatute of Queen Anne.

It has been ingeniouſly, metaphyſically, and ſubtily argued on the part of the defendant, that there is a want of property in the thing itſelf, wherein the plaintiff ſuppoſes himſelf injured, and conſequently, if there is no property or right, there can be no injury or privation of right. The plaintiff's ſuppoſed property has been treated as quite ideal, imaginary, and not reduceable to the comprehenſion of man's underſtanding; not a ſubject of law, nor capable of its protection, as all objections to this property or right being allowed and protected by common law, reſt entirely on the arguments to ſhew that ſuch allowance or teſtimony is not applicable to the ground of reaſon, I ſhall think it

* The fact is otherwiſe; many different editions of this book were printed and ſold publickly with the name of the publiſher, without challenge, excepting in the caſe of Donaldſon, mentioned by Juſtice Willes in the former opinion, page 10.

fit,

fit, however abſtract it may ſeem, to conſider certain great truths and propoſitions, which we, as rational beings, that is, to whom reaſon, is the great law of nature, ~~has~~ laid down the obligation of being governed by, and which is moſt ably illuſtrated by the learned author of the religion of nature delineated; ~~who~~ ſays, that moral good and evil are coincident with right and wrong; that cannot be good which is wrong, or that evil which is right; that right reaſon is the great law of nature; by that our actions are to be judged, and according to their conformity to this, or deflection from it, are to be called lawful or unlawful or bad; that whatſoever will bear to be tried by that reaſon, is right; and that which is condemned by it is wrong; that to act contrary to truth is to effect the ſame thing: Then, ſpeaking of truths reſpecting mankind in general, antecedent to all human laws, that man being capable of diſtinct properties in things which he only of all mankind can call his; he ſays, that the labour of B cannot be the labour of C, becauſe it is the application of the organs and powers of B not of C, to the effecting of ſomething; therefore the labour is as much B's as the limbs and faculties made uſe of are his; it is not the effect and produce of the labour of C; therefore this effect, the produce, is B's, and not C's; it is as much B's as the labour was his; it is not C's; becauſe what the labour of B cauſes or produces, B produces by his labour; therefore it is not C's nor any others; and if C ſhould pretend to any property in it, which B only can properly call his, he acts contrary to truth. To deprive any man, he ſays, of the fruit of his own cares and ſweat, is to enter on it, (for he is ſpeaking of the cultivation of land) as if it was the effect of the intruder's pains and travail, it is an innovation of his right, and aſcertaining that, which is not ſo to be; as certainly there are things which one man only can, conſiſtently with the nature of truth, call his, ~~own~~. Without going further, he demonſtrates, in the 28 and 29th propoſitions, thoſe things which only one man can properly and truly call his own, muſt remain his, till he agrees to part with them,

by

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^ beyond

by compact or denizen; because no man can deprive him of them without his approbation *, but the depriver must use them as his own, they are not so, it is a contradiction to truth; for to have the property of any thing, and to have the sole right of using it, are equivalent expressions. Property without use is an empty sound; he who uses or disposes of a thing, does by that declare it to be his; because this is all, that he whose it is can do: borrowing or hiring afford no objection to this, for he uses what is his own for the time allowed, and his doing so is only one of those ways in which the true proprietor disposes of it.

From this great theory of property, it is to be collected, that a man may have property in his body, life, fame, labour and the like; and in short in any thing that can be truly called his: it is incompatible with the peace and happiness of mankind to violate or disturb, by fraud or force, the possession of any one, or the disposal of these rights, as well as it is against the principles of reason, justice and truth: it is what every man would think unreasonable in his own case; that visible disposession by the true proprietor, whose it is, cannot be carried in the extent and meaning of the proprietor's assent † and approbation in that behalf, whether it be in the case of borrowing, hiring, or contract of any sort; which I shall further take notice of when I speak of publication. I shall in the next place observe, that, in the arguing, the definitions of property, which have been taken notice of at the bar, are in my opinion ve-

* A person must be hardly pushed when he is drove to metaphysical reasons, as an excuse for dispensing with a positive statute. The property of books is never taken altogether from the author or his assigns, by this act, but only it ceases to be a monopoly after fourteen or twenty-eight years: Others may then also print them as well as the original proprietor, and the publick utility requires it, otherwise books would always be kept so high, that only the rich could afford to buy them.

† The discoverer of any useful invention in arts, such as, the Orrery, Harris's Time-piece, for finding the longitude, &c. deserves protection at common-law, as much as a literary composition, yet these inventions can have a monopoly by patent, only for a limited time.

ry

ry inadequate to the ſubject of property, this day; and they are admitted by writers as ~~a~~ things ~~preſumptive~~, not to ſay imaginary ſtate, when all things were in common, when that common right was to be deemed veſted by ſome act, to render the thing privately and excluſively a man's own, which by that act was as much another's. Theſe ~~poſitions~~ too, when examined, will be found principally to apply to the neceſſaries of life, and the coarſer objects of dominion, which the occaſions of a man ~~intirely~~ call for; and in conſequence, the property ſo deſcribed by Puffendorff was uſeful to man, and capable of being faſtened upon. Mr. Locke in his 2d volume folio, page 65, ſays, enough was to be left for others; as much as any man could uſe, to any of the advantages of life, before it ſpoilt, ſo much he could fix a property in; whatſoever was beyond this, was more than his ſhare, and belonged to others: So it was by Grotius, B. II. c. ii. ſect. 2. when he ſays ——— it is evident ſurely, that theſe definitions give a ſort of property, little ſuperior to the legal idea we now have of ~~this.~~ Theſe great men, ruminating back to the origin of things, loſe ſight of the preſent ſtate of the world, and end their enquiries at that point, where we could wiſh, they ſhould have begun, ~~with our exiſtence;~~ but Puffendorff, pages 307, and 377, ſaith, ~~theſe, without diſtinction,~~ were not ſettled at the ſame time, nor by any one ſingle act, but by ſucceſſive degrees, nor in all places alike; but property was gradually introduced, according as either the condition of things, and the number and genius of men required, or as it appeared requiſite to common peace. Since theſe ſuppoſed times, ~~the~~ univerſal communion, ~~of~~ objects of property has been much enlarged by ~~the~~ diſcovering, ~~or the~~ invention ~~of~~ arts, ~~to~~. The mode of obtaining by occupancy has been abridged by laws, and the abſtaining from what is another's, forced by them; a diſtinguiſhable exiſtence in the things claimed ~~actually~~ as property, ~~only~~ in the things ſo claimed, ~~that from its true or falſe repreſentations;~~ that is its true owner are its eſſentials; and not leſs

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Property

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evident in the preſent caſe, than in the immediate objects of theſe definitions; and there is a ~~more~~ material difference in this ſort of property, ~~than~~ that gained by occupancy, which before was common, and not ours, till rendered ſo by ſome act of our own; and this ~~was~~ clearly ſo in authors, and unleſs rendered common by ~~us, by our~~ act and full conſent, it ought ſtill to remain ſo. The utility of ~~the~~ thing to make it an object of property, has been long diſputed. It appears by Barbyrac's notes upon this very ſubject, where it is rendered an unneceſſary and ſuperfluous diſtinction: things of fancy, pleaſure and conveniency, are as much objects of property, and are ſo conſidered by the common law (which makes our monkeys or parrots, or the like, our property) ~~or~~ any thing franchiſeable and valuable; as is laid down in 12 Harry VIII. and in Brook's Abridgement, and Comyn's Digeſt, 1602, where he does not cite any authority. The beſt rules, both of reaſon and juſtice, ſeem to me to be, that they aſſign to every thing capable of ownerſhip ~~the~~ legal and determinate owner; for the capacity to faſten on any thing, is a thing of a corporeal nature, being requiſite to every object of property, plainly partakes of the narrow and confined ſenſe in which property has been defined by ~~the~~ authors. A capacity to be diſtinguiſhed ~~to~~ anſwer every end of reaſon and certainty, which is the great ~~fruit~~ of the law, and is all that wiſdom requires to ſecure the poſſeſſions and profits, and to ~~make and~~ preſerve peace. It is ſettled and admitted, according to Webb and Roſe, Pope and Curll, ~~and~~ Foſter and Waller, the Duke of Queenſberry and ~~Chaloner~~ *, it is ſettled and adjuſted from them, that literary compoſitions, in their original ſtate, and the right in the firſt publication of them, are the private and excluſive property of authors, and that they may be ever reſtrained ſo; and if ever they are raviſhed from them by publication, trover or treſpaſs lies. It has been likewiſe admitted now, the

* See Judge Yates's opinion, with his anſwer to theſe caſes; they are none of them applicable to this.

person's claim is founded upon the original right to this subject, as the labour of author; and the effect and produce of that labour is his; it is a commodity saleable and profitable ——— For though the sentiments, the doctrine, may be called ideal; yet when the same are communicated to the sight and understanding of any man, by the medium of printing and writing, the work becomes a distinguishing subject of property, and not totally destitute of corporeal property, how without property it is useless to any author *; in that state it is lost to society in point of improvement, as well as to the author in point of interest. The publication, therefore, is a necessary action, and the only means to render the confessed property useful to mankind and profitable to the owner; if thus, they are jointly concerned. Now, to consider this only a necessary act to make the work useful and profitable, to be destructive at once to the author's confessed original right, against his express will, seems to be quite unreasonable; neither is it at all warrantable by the arguments advanced by these authors on the law of nature and property; for Barbyrac's notes clearly shew, that the right acquired, of taking possession, does not cease when there is no possession. A perpetual possession is impossible; though the above hypothesis will reduce possession to nothing: that the consent of the proprietor, the renunciation ought to appear; for his possession is nothing else but a resolution of will to retain what a man has; what shall we suppose he renounces his right to it because he is no longer in possession? we ought to have some other reasons to believe he has renounced his personal right to it; wherefore should he? We may presume it thus in respect of those things which remain such as nature has produced them; yet as to all other things which are the fruits of human industry, and are then with great la-

* Is the monopoly granted for a certain time by the statute of no use to the author or proprietor? No author ever yet complained of its being too short: This contest is between bookseller and bookseller, and not between authors and the public.

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bour and contrivance rendered useful, it cannot be thought but that every one will preserve his right in them, till he makes an open renunciation: Now, there is no open renunciation in this case, but a constructive one, only from the publication; a renunciation is a fact that ought not to be presumed; but the contrary is found here, that it was against his express will and consent. But it was said at the bar, that if a man buys it, it is his own. What, is there no difference between selling a property in the work, and only one of the copies? To say selling the book conveys all the right, begs the question; for if the law protects the book, the selling does not convey away the right; it does not alter the nature of the thing, any more than the sale conveys it away, where the statute protects the book; therefore the seller's consent is not to be carried beyond his manifest ~~consent~~; But will not such a construction extend the partial claim of the owner beyond ~~its~~ intent and true meaning, which is no more to be implied upon this compact, than in the case of borrowing or hiring. This was compared at large with the use of throwing land into the highway; the intent therein precedes and accompanies the right; as it was given, so it may be used; but the intent of circumscribing that right; if they fill the road with cattle, an action lies, for then they have exceeded the purpose of the gift: And can it be conceived, that in purchasing a literary composition, the purchaser ever thought he bought the right to be the printer and seller of that specific work? The improvement of knowledge or the amusement which he can derive from the performance, is all his own; but the right to the work, the copy-right, remains in him whose industry composed it; the buyer might as truly claim the merit of the composition, by his purchase, in my opinion, as the right of multiplying copies, reaping the profit of the ~~invention~~ of this sort of property, is as much against sense, as against natural reason and moral rectitude; it is against

the conviction of every man's breaſt * who attempts it; as he knows it not to be his own, he knows it to be another's, and does not do it for the ſake of the public †; but —— The metaphyſical reaſon during the refined metaphyſical ſpeculation, is all on that ſide of the queſtion; for arguing by analogy only things ſimilar to nature, that it is not dangerous, and the like arguments, of all the moſt fallible; but by the law of nature, of truth, and the light of reaſon, the common ſenſe of mankind, is on the other ſide of the queſtion: ——— If the above principles of reaſon are juſt, why ſhould the common law be deemed ſo narrow, ſo illiberal, as not to recognize and receive under its protection a property ſo circumſtanced? as the preſent common law, now ſo called, is founded upon the law of nature and reaſon; its grounds, maxims and principles are derived from many different fountains, ſays that learned Judge Dodridge in his Engliſh lawyer, 'The natural moral ~~falacy of~~ the civil ~~common~~ law, ~~the legal~~ uſe, cuſtom "and converſation ~~appear, when~~ collected out of the ge-"neral ~~deſcription of~~ nature, and condition of human "kind." Thus Judge Dodridge page 155 to 161; and the ſame doctrine is ~~agreed~~ throughout in the common law, pages 614 and 61, Judge Dodridge ſtates the ſeveral maxims and grounds, the particular heads from whence they are derived; and he places under the head of moral ~~falacy~~, ~~the~~ maxims of common law, as borrowed from thence. ———That what is now called the Common-law of England, was made up of a variety of laws enacted by the ſeveral kings reigning over diſtinct parts of this kingdom, which ſeveral laws affected only ſome parts of the kingdom, till they were extended over the whole nation by Al-

* It is as much againſt ſenſe, law, or reaſon, to grant a perpetual monopoly of books, as to grant a monopoly of air or water, of corn or proviſions; and to convict a perſon who has acted agreeable to this ſtatute, muſt be againſt law and the feelings of every man's breaſt.

† New publications are generally ſold ſo high, that giving cheap and uſeful editions as ſoon as the monopoly is expired, ſurely muſt be a publick benefit.

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philosophy

vid. Doddridge p. 158.

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fred, as appears from Fortescue's preface, and now it is deemed the common law of England because it was then, ——But it was originally from Edward the Confessor, for they could be from that time; men in his time spoke sense *, and before they spoke *(here is an unlucky blank)* Lord Coke says, the common law is common right, and common justice. I make these observations on its general name to free it from any idea of magical enchantment, or to free it from a supposition of its being infringed in its efficacy in all these principles and grounds, ~~on~~ which it is laid down to be derived: the common law therefore, being so found, and named, is universally comprehensive, says Brackton, its principles, are in respect to mankind, which are borrowed from civil law.——That in respect of the several species of property, though the rules touching them must ever have been the same, yet the objects of it were not all at once known to common-law; or the world would have known that of gun powder, and a thousand others, that can be mentioned; many of them have been disputed as not being objects of property at common-law, which however ~~might have the face~~ of being established as such. In the year book of Henry VIII. there was a dispute upon the footing of property, whether an action would lay for taking away a blood hound; the argument used against it was somewhat like those used upon this occasion; and I will put it: it was argued, it was not for profit, but pleasure; that when the dog was out of possession, he ceased to have any property in him; and he was not. would not lay upon him, ~~but~~ he was not.——

All these arguments were made use of on the species of property at that time of day. Upon what principles did the court determine upon it? it was determined upon these principles, as Brook says,—— where any wrong or damage

* Had this judge confined himself to common sense, he, in this case, would not have gone back near a thousand years before the invention of the art of printing, to establish a common-law right to printed books; he has not been able to specify one of those old laws, which he says were enacted, where literary property is protected.

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is done to any man, the law gives him a remedy *; be it only a thing for pleaſure, the law gives him a remedy. It is not lawful to take any thing againſt my will; therefore he inſtances ——— ſays he, my Popping-jay, when I go home, cheers and refreſhes my ſpirits; no man ſhall take him away againſt my will. Brooke in his abridgment of this caſe, ſays this, which is very material; the reaſon why this property was not liable to the other remedies, or charges, or modes of conveyance, is, becauſe it was a property not early known; but yet treſpaſs will lay upon it; you ſhall not take it againſt my will. I think from this caſe it is clear, that though the above was a ſpecies of property not early known, at leaſt not early eſtabliſhed by common law, yet the common law did not invalidate the poſſeſſion and property of it; it being matter of pleaſure or profit, made no ſort of difference; that it was not neceſſary, that every ſpecies of property ſhould be liable to the ſame circumſtances or remedies; that every perſon would not act againſt the rules of morality and of juſtice in diſturbing another's pleaſure and property in his poſſeſſion, and againſt the peace of mankind. One would have thought this caſe would have reſted; but in Croke and Owen another action was brought about a grey-hound; it was ſaid the plaintiff was out of poſſeſſion of his dog, and being ——— he had loſt his intereſt in him, and had no remedy at all. The action was held maintainable on the like arguments uſed in the year book. Now the common-law being founded upon ſuch principles laid down, and which are avowed by Dodridge and others, and there is a remedy for any wrong and grievance the ſubject may ſuffer by the invaſion of his right; for this ſort of action varies according to the variety of the caſe; that the invaſion of the plaintiff's property in the preſent caſe is the proper ſubject of ſuch an action, and it may be maintained at common law without any ſtatute of the realm, or particular circumſtances; that it may undergo a trial by a jury, ſo as to

* And in this caſe the parliament have by ſtatute given a ſufficient remedy.

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anſwer every reaſon of juſtice, it ſeems to me without any doubt. I cannot conceive any property whatſoever more emphatically a man's own, any more incapable of being miſtaken, than his literary works. And if an author has really and openly abandoned it; that is a fact that is to be found; and the plaintiff in ſuch proceſs may be available in his action; if it be given to the public, abandoned, or publiſhed without a name, or if allowed to be pirated without objection; all this is evidence to a jury of ſuch a gift to the public; it is not all above the comprehenſion of a common juryman; and not ſo ideal, but that proper proof may be made of the original, or proper ownerſhip; the edition long deſerted, no proper owner; all theſe things may be brought into proof; all the difficulty lay upon the plaintiff; he is to make out his right, and the injury done to his property: In the preſent caſe, there is no chaſm or interval of time, when the right of this work can be ſaid to be renounced, except the bare publication of it; and if that is to prevail againſt an author, why ſhould not prerogative property, as it is called, which is founded upon the ſame argument as an author's right to their works, I own I know no difference in that reſpect, between the rights of the crown and the properties of the ſubject. That there is no hardſhip put upon the defendant, in the preſent caſe; he knows the work is not his; that he had no right * to publiſh it; he does it with his eyes open, and it is ſaid; that whether it was a property renounced or not, it was not his buſineſs to enquire. Upon the whole, I think an author's right to his works, the copy-right, is fully eſtabliſhed; becauſe it is admitted, a copy in his own hands, and he has the original right to publiſh it. Further, this idea of an author's property, that the copy of a book, has not been familiarly uſed, but technically, as an author's right of printing and publiſhing his work; and theſe expreſſions, in a variety of inſtances, are not to be conſidered as creators of

* The monopoly being out, he had a right by act of parliament to publiſh Thomſon's Seaſons in common with all the printers in the kingdom.

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ſuch a right, but as ſpeaking of a known right. This appears from the citations uſed at the bar, which as I told you before, I ſhould allude to, which are all well known to you, the hiſtory of the acts of ſtate, proclamations, the decrees of the Star Chamber, particularly in 1586, and 1637, down to the year 1640; alſo the clauſes in ordinances, ſtatutes licenſing acts, and ſtatutes antecedent to the ſtatute of Queen Ann, and the expreſſions uſed in that ſtatute, which ſpeaks with preciſion of this ſort of property, as a known thing; which ſuppoſes the actual conſent of authors or proprietors, neceſſary to the printing this work *; this openly and ſtrongly ſupported by concurring ſentences of judges in caſes of common law at different periods of time, and in Skinner, that the ſtatute of Charles II. did not give the right by action, ſo in Modern 207, where Pemberton ſpeaks of a grant to print, how far it ſhould ſtand good againſt thoſe who claim a property paramount the kings grant; the court in ſpeaking of predictions in almanacks with the prognoſtications, ſay, they alter the caſe no more, than if a man ſhould claim another man's property, by putting ſome inconſiderable addition of his own. In the caſe of Bedloe, in an action for printing the Pilgrim's Progreſs, it is aſſerted in the declaration, that the plaintiff was the true proprietor. It appears, that the crown's ſole right of publication was founded on property in the 3d Modern, that the property reſts in the king, where no individual perſon can claim any right in it. This argument ſhows he thought he could veſt the caſe in the right of the king's property only; for here the argument is far-fetched, and applied; for if there is no private property, it would be common, and not the king's, like the Elements, the Air, Water, and the like. The caſe of the univerſity of Cambridge, is a ſolid well conſidered determination, upon the ground of the original right of publication belonging to the king. So that there is no preciſe

* The conſent is only required, if the work is reprinted within the 14 or 28 years limited for the monopoly, and not afterwards. *See the ſtatute annexed.*

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deciſion * in this particular point, yet this uniform belief of ſuch a property at law deſerves the greateſt attention and weight; where every principle of reaſon and juſtice concur in deciding in favour of property. Beſides this, the uniform conduct of the court of Chancery ſince the ſtatute, in interfering by way of injunction, without regard to the work being entered according to the ſtatute, all the ſuits being brought within three months, ſhews that the property in the work muſt have exiſted antecedent to the ſtatute †; for the ſtatute could not give a right antecedent thereto. The declaration that the author muſt have the ſole right of printing the book, but it muſt be on the terms of the conditions in the licenſing act; the conſequence of an action, and injunction, are worſe than the penalties; and one reaſon given for the licenſing is, that the perſon muſt not plead ignorance; which act of notoriety was required by all the licenſing acts and ordinances.

As to the ſecond queſtion, whether the copy-right is given away by the author's publication, I have ſpoke upon this head almoſt neceſſarily and collectively with the firſt; I ſhall only add, I am of opinion, that the author's publication does not give away the right of the copy, but it remains ſtill in the author's hands; that it no more paſſes to the public, for the free-will and conſent of the author, than the unlimited uſe of every advantage the purchaſer can reap from the doctrine and ſentiments the work contains: he may improve upon it, he may imitate, tranſlate, and expoſe the ſentiments, but he acquires no right to print the work: the right to publiſh the work, is as far beyond as the limits of the other; they appear to me very different in nature; and it conſiſts in this, that the property of the maker of a mechanical engine is confined to that thing he has made; that the machine made in imitation of it, is a different work in ſubſtance, materials, and effects,

* This acknowledgement of there being no direct deciſion on the common-law right, is a full anſwer to all this reaſoning by inference.

† See Judge Yates's opinion annexed in anſwer to this point, viz. the practice of the court of Chancery, concerning injunctions.

in which the inventor of the original machine cannot claim any property *, whenever it is not his; whereas the reprinting of a book, contains the ſame in ſubſtance; the compoſition therefore is the ſubſtance; the paper and ink ſive only the inſtruments or vehicle of value proves it; for though the defendent may ſay the materials are mine, which, upon who's paper or parchment ſoever it is expreſſed, it is his; his mixing the materials with the author's property does not make it leſs diſtinguiſhable than it was before; for the identity of the copy will appear to be his; the literary compoſition, printed upon another man's paper, is ſtill the ſame: and this is ſo evident, in my apprehenſion, that the ſtrongeſt words I can uſe, cannot ſufficiently explain my ideas of that the author has not given it away or abandoned it by the publication.——The next queſtion is, whether the ſtatute of Queen Anne has taken it away, or reſtrained it, ſo that the author's property expires with that limitation. Whoever contends, that this kind of property is not known by common law, muſt contend that the ſtatute veſted † it with a new kind of property which extends to the author, according to the limitations and reſtrictions in the act; and it muſt be contended alſo, that the legiſlature had in view, or intended to aboliſh for a time, till the terms in the act are complied with, that right of univerſal communion, which the publication of a work indiſcriminately gives to all mankind; or that in caſe theſe terms of the act were not complied with, it might be printed without offence. The idea of this right, does not appear by any act, the words, "which has lately been done without the "author's conſent," that treat it as the abuſe of a right, not as an aſſertion of any common-law right, which the ſtatute intends only to put a temporary reſtraint upon; for the act ſtates it to be done to the detriment of the families. This is very different from the argu-

* This is a very curious way of reaſoning, and will, if ſound law, make patents obtained by the inventors of uſeful arts, of no avail.

† The ſtatute is expreſs and clear; authors and their aſſigns are *veſted* with an excluſive monopoly for a limited time, and no longer.

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a Penalty for a Right, which subsisted before

ments made use of at the bar for the defendant, that there was no injury, no deprivation of right; the particular words are very remarkable, because it recites the very words antiently made use of in ordinances, statutes, and decrees referred to, as a known right of the property which is transferable: I am not satisfied with saying, such a right may be implied only, but they are so expressed; the legislature cannot misunderstand the right of the copy as the technical recognition of a right in the very words of the statute. The statute was brought in at the suit of authors, printers, and booksellers, but principally by the two latter*; but not from any doubt of their property in copy-right, which appears from page 240 in the 16th volume of the Journals of the House of Commons; but as the proof was difficult to ascertain the damages they really suffered by the injurious multiplication of copies of those books they had bought and published; and this appears from the case they produced to the members at that time: this was not done upon the idea at that time of the right of universal communion; all the satisfaction they could obtain then, was by penalties; all the restriction here is the entering it in the stationers company register-book; this is to shew the penalties that are granted; if that is neglected, the statute does not attack the case of authors who do not comply; but this is still open †, and the case also of those who do not sue within three months; for if the statute gives the remedy, which was before given by the common law, the party may wave the statute, and go to common law. The question only depends upon this point, whether it was a right newly created, or not? If so, it will receive its birth, duration, and

* This statute was obtained at the suit of printers and booksellers only; no author appeared among the petitioners: and till about 20 years ago, the booksellers were well satisfied with the temporary monopoly; but now by the countenance of Ld. M. they want to extend it for ever.

† Many instances might be given, where authors who believed in this doctrine, and omitted to enter their books in terms of the statute, lost their right by so doing; for example, the first edition of Sermons to young Women was not entered, it was reprinted without consent of the author, and he was advised not to prosecute the publisher.

remedy from the ſtatute, and no other remedy could be purſued; but if there was an antecedent law right, the common-law remedy would remain, and the ſtatute remedy would only be obtained by obſerving only the preſcription of the ſtatute. The preamble of that act was the fulleſt aſſertion of a copy-right that could be; when this introduction was abridged, they ſay the caſe was guardedly inſerted; the Univerſitie had conſiderable copy-rights; my Lord Clarendon's hiſtory was very lately purchaſed by the Univerſity of Oxford; I believe the third volume was not publiſhed till —— the proviſo however is general. If there was not a common-law right previous to the ſtatute, I would aſk why is this clauſe received *: it ſeems to me to be incapable of receiving any other conſtruction; ſurely it was not the right of publiſhing, till it became univerſal when it firſt came out, for that is the ſame, as if a copy was left open by common law to every piratical purpoſe. It is ſaid, that the right that was given by letters patent, were only affected, for the act does not mention one title that could prejudice or confirm it. The act ſeems to be the effect of extraordinary caution, that the right at common law ſhould not be affected, but that the right and remedy would ſtill remain unaffected by this ſtatute; therefore I conſider the proviſo entirely in that light, that no inferences are to be drawn from it of a different nature. The repeated practice of the Court of Chancery, in entertaining a juriſdiction by writs of injunction, and as appears by the many caſes cited, the evidence the conſtant ſenſe of the great lawyers of that court, that the ſtatute did not ſtand in the way of a general remedy upon an original right; to this purpoſe the caſe is mentioned in —— after the ex-

* The judge may alſo be aſked one queſtion, ſuppoſing, (but without admitting) that a right exiſted at common law previous to paſſing the ſtatute; could not the legiſlature annihilate, or abridge that right, and grant an equivalent which is done by this ſtatute: the heritable juriſdictions in Scotland, were in the ſame manner aboliſhed by the ſtatute anno 1746: Lord Mansfield himſelf, will by and by, be admitted as evidence for proving what is ſaid in this note to be *law*; for the ſtatute ſuperſedes any common-law right.

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of Eyre & Walker (not the new) whole Duty if more

piration of the term granted by the ſtatute of Queen Anne, and the authority of my Lord Talbot, Hardwick, and Sir Joſeph Jekyl, or any other great lawyers ſitting in the Court of Chancery, and deciding upon the legal right, for the ſake of a more effectual relief than could be exerciſed, there is as great an authority, as if they ſat determining upon a legal right, in this, or any other court in Weſtminſter-hall: they have been always ſo accounted. In the laſt cauſe but one, it was decided in the Houſe of Lords, we had the opinion of the judges, moſt of all the caſes cited were thoſe determined in the Court of Chancery, the caſe alluded to, in the nature of an injunction to ſtay waſte, is never brought to a hearing, where the court is not of the ſame judgment with the plaintiff; the ſame ground with which it is continued, muſt be ſufficient for a perpetual injunction. Where the defendant cannot vary the caſe, he ſubmits, and the caſe ſtops, unleſs the plaintiff thinks fit to go on for ſome further relief. As for an account, as it is ſaid, if the defender is diſatisfied with the order for continuing the injunction, he may appeal to the Houſe of Lords; ſo they have the effect and operation of poſitive deciſions. Now the caſes I ſhall take notice of are, the obſervations that have been taken notice of at the bar here upon the caſe of Eyre and Walker, where Sir Joſeph Jekyl granted an injunction for reſtraining the defendant from printing the Whole Duty of Man; it was ſaid at the bar, this muſt be the new Whole Duty of Man; it muſt be ſince the making of the act: I have compared the title page of the two books, the new and old Whole Duty of Man; the copy of the order 9th of June 1735 ſhews it to be the old one, and Dr. Hammond's letter to the bookſellers ſhews it to be in 1657. The anſwer that was given in the caſe of Mott and Faulkner by Lord Talbot in 1735 for printing Pope and Swift's Miſcellanies, was, that this book was printed in 1727; but the argument before the Court of Chancery by the counſel was upon the foundation, that many parts of thoſe Miſcellanies were printed ſo long before, as 1701-7 and 8. It was mentioned by brother Willes, that the ſentiments of the Church of

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England-man printed anno 1708, and several others of as old a date, take it entirely out of that act; but Lord Talbot continued the injunction to the whole. In the case of Tonson and others against Walker, that was to restrain the defendant from printing Milton's Paradise Lost; the injunction was granted by Lord Hardwick upon Lord Mansfield's motion, on reading the assignment, which was made to Samuel Symons and several other assignments were upon it. In Tonson against Walker, 13th April 1762, this bill was filed in November 1761, suggesting the defender had advertised to print Milton's Works, and these last notes were within the time of the act; but upon a very solemn hearing, Lord Chancellor granted an injunction, and it was prayed in the injunction to restrain the defendant from printing the life of Milton, or his Paradise Lost, or Dr. Newton's notes. Now these cases prove, that the Court of Chancery granted injunctions to protect the right upon the supposition of its being a legal one; and no injunction was ever refused in Chancery upon this ground, till an objection was raised in this court between Tonson and Colins; the reason of which has been always declared in this court, to be not from any doubt, but merely on a supposition of collusion, which was the reason why the case was never argued nor determined. Upon the whole, therefore, I conclude with saying, that notwithstanding the principles of reason, moral, or natural justice, or notwithstanding the evidence of common and long received opinions of this property appearing in ancient proceedings or in law cases, upon the clear sense of the legislature, and opinions of the greatest lawyers of their time in the Court of Chancery since that statute; the right of an author to the copy of his works appears to me to be well founded; and that the plaintiff, under this special judgment, appears to be sacred in his property: and I heartily wish, that the learned and industrious may be from henceforth allowed, not only to reap the fame, but the profit of their productions to the honour, advantage, and support of themselves and families.

SIR

with Notes,

conjunctive

common Law; upon

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SIR JOSEPH YATES.

I SHALL ever be extremely diffident of any judgment of mine, when I ſhall have the misfortune to diſſent from either of my brothers; and after the very learned and ingenious arguments, which each of them have delivered, I cannot but ſee with particular ſenſibility the unequal taſk which I have now before me.—I regret too, that in ſo liberal a queſtion, ſo important to the literary world, and a queſtion of ſo much expectation, there ſhould be any diſagreement upon this bench: but if I ſhould happen to ſtand quite alone in the opinion I have formed, my ſentiments will no way affect the authority of the deciſion. Whatever my opinion however may be, ſitting in my judicial capacity, I think myſelf bound in this, and in every other cauſe, to declare it frankly and firmly.

The general queſtion for the determination of the court is, Whether, after a voluntary and generous publication of an author's work by himſelf or by his authority, the author has a ſole and perpetual property in the work, ſo as to give him a right to confine every ſubſequent publication to himſelf and his aſſigns for ever. Before I enter into the particular diſcuſſion of this queſtion, I will lay down one general poſition, which I apprehend cannot be on either ſide diſputed: That in all private compoſitions, I mean compoſitions of private authors, as contradiſtinguiſhed from public prerogative copies, the right of publication muſt for ever depend on the claimants property in the number to be publiſhed. Whilſt the ſubject of publication continues his own excluſive property, he will ſo long have the ſole and perpetual right to publiſh it; but whenever that property ceaſes, or by any act or event becomes common, the right of publication will be equally common. In delivering my ſentiments upon this great queſtion, I will purſue the ſame method, in which it was argued at the bar, both in this

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and in the former cauſe between Tonſon and Colins; for I deſire once for all to be underſtood, as delivering my opinion upon the arguments of the counſel, and upon my own conſideration * of the matter; and not by way of reply to any thing that has fallen from either of my brothers.

By the counſel, it was argued on theſe two points; Firſt, on the general principles of property; and Secondly, on the peculiar, or at leaſt the ſuppoſed uſage, or law of this kingdom.

Firſt then, it was contended, that the claim of authors to a perpetual copy-right in their works, is maintainable upon the general principles of property: and this I apprehend, was a neceſſary ground for the plaintiff to maintain; for, however peculiar the laws of this, and every other country may be with reſpect to territorial property, I will take upon me to ſay, That the law of England, with reſpect to all perſonal property, has its grand foundation in matter of law. In ſupport therefore of this firſt propoſition, ſeveral plauſible arguments were ingeniouſly urged by the plaintiff's counſel. In the firſt place, they obſerved, property was defined to be † ——— and that an author has certainly that right over his own production; but this is a definition that merely relates to the perſonal dominion of a proprietor, and not to the object: it reſpects an acknowledged ſubject of property, which is now the queſtion in diſpute; nay, it even ſuppoſes an acknowledged proprietor, and merely deſcribes the extent of his dominion. He who has the property is the proprietor; but no man can have that right beyond the juſt bounds of his property. And the point contended by the defendant is, that a literary publication be-

* We are informed by a friend of this learned judge, that for many months prior to his delivering this opinion, his leiſure hours were generally employed on that ſubject, ſo that it is a judgment given upon mature deliberation.

† Here a Latin definition is ommitted, by the ſhort-hand writer, who took down this and the former opinions, and ſeveral others occur in this and the other three opinions, which we have not materials for filling up.

comes

Jus utendi & fruendi

comes no longer an object of property; that a literary publication becomes no longer an exclusive private right.

In answer to this, it was contended on the other side, that an object of property is value; and literary compositions have their value, which are measured by the extent of their sale. I might here observe, that it will be difficult to would annex a specific value to incorporeal sentiments, when detached from the manuscript, and published at large; from that time the value, with respect to the author, depends upon his right to the sole and perpetual publication of them; and the great point in question is, whether he is intitled to that right or not: But laying this observation aside, mere value, all may see, will not describe the property in this:— The air, the light, the sun, are of value inestimable; but who can claim a property in them. It was therefore, in the third place, alledged, that a literary composition is certainly in the sole dominion of the author, till he thinks proper to publish it; for no man can lawfully take it from him, or compel him to publish it against his will. This is most certainly true; but this holds good no longer, than whilst it is in manuscript. Here, the defender has not meddled with the author's manuscript; the work was published forty years ago; the defendant has printed a set of his own, and therefore he has not meddled with any property of the author; unless the very stile and sentiments in the work were his: It was necessary therefore for the plaintiff's counsel to advance the proposition, and which was the only one that affected the cause, namely, that the author has a perpetual property in the stile and ideas of his work, and therefore that he or his assigns will be for ever intitled to the sole right of it. To this it was answered, that invention and labour are the marks of property; and that as literary compositions were the objects of the author's sole pains and labour, therefore they have the sole right to them. If this argument is confined to the manuscript, it is true; it is the object only of his own labour, and is capable of a sole right of possession. All ideas of property have their extents, and

they have their proper bounds: invention and labour, be they ever ſo great, cannot change the nature of things, or eſtabliſh a right, where no private right can poſſibly exiſt. The inventor of the air-pump had certainly a property in the machine which he formed, but did he thereby gain a property in the air, or did he gain the ſole property upon the abſtract principles upon which he conſtructed his machine? and theſe may be called the inventor's ideas, and as much his ſole property as the ideas of an author.—To extend this argument beyond the manuſcript to the very ideas themſelves, ſeems to be very difficult: indeed the invention and labour, which are ranked among the modes of deſcribing ſpecific property in the ſubject itſelf, are that kind of invention and labour which are known by the name of *occupancy*; in that ſenſe, invention is defining or diſcovering of a vacant property; and labour is the taking poſſeſſion of that property, and beſtowing cultivation upon it: but how is poſſeſſion to be taken, or any act of occupancy to be aſſerted on mere intellectual ideas? all writers agree, that no act of occupancy can be aſſerted on a bare idea of the mind; ſome acts of appropriation muſt be exerted, to take the thing out of a ſtate of common, and denote the acceſſion of a proprietor; for otherwiſe, how ſhould other perſons be apprized they are not to uſe it; but theſe are acts that muſt be exerciſed upon ſomething: the occupancy of a thought, would be a new kind of occupancy indeed: by what outward mark muſt the property ——— appropriation, and if theſe are void of that which the act of occupancy requires, it is a proof to me they cannot be the object of property.—Here another doubt ariſes, which I cannot, I acknowledge, anſwer; at what time, and by what acts does the author's property attach? The ſtatute of Queen Anne very properly obviated this, by fixing the commencement of that property from the time of entering it in Stationer's-hall; and in the caſe of a mechanical invention, the like ſtate commences from the date of the patent; but if authors derive their right from common law, (a law which exiſted from time immemorial, and therefore long before the

the Stationer's Company, and can have no dependance on the Stationers Company), the author's right will be the ſame whether he enters it in that book or not: When therefore does this idea of the author's property attach? In other caſes, where the heir has a right to any ſpecies of property, it commences from his taking poſſeſſion, and an author is fully poſſeſſed of his ideas when they ariſe in his mind; and therefore from the time theſe ideas occurred to him, or from the time he writes them down, they are his property: then if another man has the ſame ideas as an author, he muſt not preſume to publiſh them; he may be told theſe ideas were pre-occupied, and become private property. It would be ſtrange indeed if the very act of publication can be deemed the commencement of private property; even after publication many thouſands may never ſet their eyes upon a book; and would not theſe have a right to chuſe the ſame ſubject, and have the ſame ideas upon it? The improbability of their not hitting theſe ideas is not to the point; if they ſhould occur to the author, he has a right to publiſh them: of this I think there can hardly be a doubt. Yet property (ſays Puffendorff) is a right by which the very ſubſtance of a thing belongs to one perſon; ſo that it cannot in the whole, nor after the ſame manner, become another's; and in the Digeſts ——————— but ſentiments are free and open to all, and many people may have the ſame ideas upon the ſame ſubject; in that caſe every one of theſe perſons is equally poſſeſſed, and equally maſter of all theſe ideas. Is it poſſible then, that any one individual can have a ſole and excluſive property in theſe? But there is one ground more, upon which the plaintiff's counſel contended this claim, and which at firſt ſight appears the moſt ſpecious of all; and that is, they endeavoured to inforce this copy-right of authors as a moral right, and to ſupport it by arguments. ——————For this purpoſe Mr. Blackſtone * obſerved, that the labours of the mind

* It muſt be obſerved that Dr. Blackſtone was counſel for the plaintiff in this cauſe: He, in his excellent Commentary on the laws of Engl. l, eſtabliſhes

are as well intitled to the benefit of the acquiſitions, as thoſe of the body; that literary compoſitions being the produce of the author's own labour and abilities, he has an equitable right to the profits they produce, and he is fairly intitled to theſe profits for ever; that if others uſurp or incroach upon theſe rights, they are evidently guilty of injuſtice in pirating the profits of another's labour, and reaping where they themſelves have not ſown. This argument indeed has a captivating ſound; it ſtrikes the paſſions with a winning addreſs; but this will be found as fallacious as the reſt, and equally begs the very queſtion in diſpute; for the injuſtice it ſuggeſts, depends intirely upon the extent and duration of the author's property, as it is the violation of that property that muſt alone conſtitute the injury: If therefore his ~~it is~~ property ~~to~~ be determined, no injury is done him; and the queſtion therefore is, whether all the property of the author did not ceaſe, and the work become open by his own act of publication? In that caſe, the defendant cannot be charged with any injuſtice; but has merely exerciſed a legal right; and, however we may lean to literary merit, the property of authors muſt be ſubject to the ſame rule of law which the property of other men is governed by: it is therefore as capable of being laid open, as any other invention of any man's; and if by publication it becomes common, as I ſhall obſerve bye and bye, can the author complain? can he complain of the loſs of the bird he has turned out? But the author inſiſts, that it conſcientiouſly belongs to himſelf and his aſſigns for ever, as being the fruits of his own labour. That every man is intitled to the fruits of his own labour, I readily admit; but he can

bliſhes no ſuch doctrine; nay, his allowing his own work to be printed in Ireland, without attempting a proſecution there for his common-law right, ſhows that he is convinced in his own mind it has no exiſtence.—The work is printed in England ſolely for the Doctor's own benefit; copies coming from Ireland have been ſeized in the port of London by his order, as being a violation of the ſtatute; ſo that it is evident he has neither abandoned the copy, nor deſpiſes the profits; yet he dares not attempt a ſuit in Dublin, becauſe the ſtatute of Queen Anne does not extend to that kingdom.

only

only be intitled to this according to the fixed conſtruction of things, and ſubject to the general rights of mankind; he muſt not expect that theſe fruits ſhall be eternal; that every vegetation and increaſe ſhall be confined to himſelf alone, and never revert to the common maſs: in that caſe the injury would lye on the ſide of the monopoliſt, who would thus exclude all the reſt of mankind from enjoying their natural ſocial rights. The labour of an author has certainly a right to its reward; but it does not from hence follow, that his reward is to be infinite, and never to have an end: The legiſlature have fixed the extent of his property, and have expreſsly declared he ſhall have it no longer: Have the legiſlature been guilty of injuſtice? Little cauſe has an author to complain of injuſtice, after he has enjoyed a monopoly of twenty-eight years. If a ſtranger has taken his manuſcript from him, or has ſurreptitiouſly obtained a copy of his work and printed it before him, he might complain of injuſtice: And here lies the fallacy of this ſpecious argument; it was put, as if the author was totally robbed of the profit of his labour; as if all his emoluments were foreſtalled, without ſuffering him to reap any emolument whatever. In that caſe it would be the higheſt injuſtice; but when no ſuch intruſion has been made upon his property; when he and his aſſigns have enjoyed the whole produce of his labour for forty years together *, what ground can remain for accuſing the defendant of immorality, or for an author or his aſſigns to ſay he is robbed of his labour. If an author is permitted to enjoy his property according to the nature of it, he can have no injuſtice done him; and if his ſituation is ſuch that he can only

injustice

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* The author of the Seaſons reaped about a thouſand guineas profit while the work was his own property; he ſold it in 1729 to Millar for L. 160.—Millar had made, it is ſuppoſed at leaſt L. 1500 of it, beſides above L. 500 for which the copy-right was ſold after his death in May 1769: Surely there is no reaſon to complain here: beſides the copy is at no time wreſted from the author or purchaſer, only others have a liberty to print the ſame work as well as they, after the twenty-eight years are elapſed.

diſpoſe

diſpoſe of it as other people can of their goods; or if he can only diſpoſe of it for the firſt publication, can the author murmur becauſe he cannot diſpoſe of it only as other people can of their property? Shall an author's claim continue without bounds or limitation, and for ever reſtrain all the reſt of mankind from their natural rights by an endleſs monopoly? Yet ſuch is the claim that is now made, a claim to an excluſive right of publication for ever; for nothing leſs is demanded as a reward and fruit of their labour, than an abſolute perpetuity. Examples might be mentioned of as great an exertion of natural faculties, and of as meritorious labour in the mechanical inventions, as in the caſe of authors. We have a recent inſtance in Mr. Harriſon's time piece, which is ſaid to have coſt him twenty years application; and might not he inſiſt upon the ſame arguments for the property in his invention, as an author can in his? If the public ſhould rival him in his invention as ſoon as it comes out, might not he likewiſe exclaim, as well as an author, that they have robbed him of his production, and have iniquitouſly reaped where they have not ſown? And yet we all know, whenever a machine is made public, be it ever ſo uſeful or ingenious, the inventor has no excluſive right to it but by patent, which can only give him a temporary priviledge, therefore this charge of injuſtice depends upon the extent of the author's property (for if no right is invaded, no injury is done)

Let us now conſider the few general rules concerning property, and ſee whether this claim will coincide with any of them. The claim is to the ſtyle and idea of the author's compoſition; and it is a known and eſtabliſhed maxim, which I apprehend holds as true now as it did two thouſand years ago, that nothing can be an object of property which has not a corporeal ſubſtance. There may be many different rights, and particular diſtinct intereſts in the ſame ſubject, and the ſeveral perſons intitled to theſe rights may be ſaid to have an intereſt in them; but the objects of them all, the principal ſubjects to which they relate, or in which

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they enjoy, muſt be corporeal; and this I apprehend is no arbitrary, ill-founded poſition, but a poſition which ariſes from the neceſſary nature of all property; for property has ſome certain diſtinct and ſeparate poſſeſſion; the ſubject of it therefore muſt be ſomething viſible. I am ſpeaking now of the object to which all rights are confined; there muſt be ſomething viſible to which all bounds are confined, that muſt have ſome marks to diſtinguiſh its properties; and that is the reaſon why theſe great marks are laid down by all writers; it muſt be ſomething that is viſible and diſtinctly enjoyed, that which is capable of all the rights and accidents incident to property: but the property here claimed is all ideal; a ſet of ideas which has no bounds or marks whatever; nothing that is capable of a viſible poſſeſſion, nothing that can ſuſtain any one of the qualities or incidents of property; their whole exiſtence is in the mind alone; incapable of any other modes of acquiſition or enjoyment, than by mental poſſeſſion or apprehenſion; ſafe and invulnerable from their own immateriality, no treſpaſs can reach them, no fortune affect them, no fraud or violence diminiſh or damage them: yet theſe are the phantoms which the author would graſp and confine to himſelf; and theſe are what the defendant is charged with having robbed the plaintiff of.—In anſwer to theſe objections, it was alledged for the plaintiff, that there are many other inſtances of incorporeal rights, ſuch as all the various kinds of preſcriptive rights and partial claims: But the fallacy lyes in the equivocal uſe of the word *Property*, which ſometimes denotes the rights of a perſon; as when we ſay ſuch a one has this eſtate or that piece of goods. It ſeems they object, the rights of things, the ſtate itſelf to which they admit, are incorporeal; and I readily admit that all rights whatever to a perſonal eſtate are incorporeal (ſpeaking of the rights of cuſtom); but the queſtion is now, whether any thing can be the object of proprietory rights, which has not the object of corporeal ſubſtance: and, for my own part, I know not of any one inſtance of any one right, which has not reſpect

respect to corporeal substance: every descriptive inheritance, every title whatever, has respect to the lands in which they are exercised: No right can exist without a substance to restrain it, and to which it is confined; it would otherwise be a right without any existence. To get over this, it was said, the profits of the publication till they are received are uncertain and casual, and cannot in themselves be an object of property; they are also incidental, arising entirely from the matter which is published: The composition therefore is the principal object of property, upon which all the profits depend, and which alone can intitle the author to these profits; for these, like the profits of an estate, depend upon the property in the principal person to which they arise; and if the author will pretend to a perpetual right in these, he must prove he has a perpetual right to the ideas which produced them; then the question returns again; and that is, Whether after publication this work continues solely the author's for ever? And here another maxim occurs, which was mentioned before; that nothing can be an object of property, which is not capable of a sole exclusive enjoyment: For property, as Puffendorff observes, implies a right of excluding others from it; for without that power the right will be insignificant; it will be in vain to contend that it is your own which you cannot prevent others from sharing in. It is not necessary, I own, that the proprietor should always have the total actual possession in himself: a potential possession, a power of confining it to his own enjoyment, and excluding all others from partaking with him, is an object of property: but how can an author, after publishing his work, confine it to himself? If he had kept the manuscript from publication, he might have excluded all the world from participating with him, or knowing the sentiments it contained: but by publishing the work the whole is laid open; every sentiment in it is made publick for ever: The author can never recall them to himself, can never more confine them to himself,

and

and keep them ſubject to his own dominion. The quotation from the Inſtitute is very applicable to this caſe *. —— From the time of the publication, the ideas become incapable of being any longer a ſubject of property; all mankind are equally intitled to read them, and every reader becomes as fully poſſeſſed of all the ideas as the author himſelf ever was. From theſe obſervations this corollary, in my opinion (for I ſpeak only my ſentiments) naturally follows, that the act of publication, when voluntarily done by the author himſelf, is virtually and neceſſarily a gift to the public. For when an author throws his work into ſo public a ſtate, that it muſt immediately and unavoidably become common, it is the ſame as expreſsly giving it to the public. He knows, before he publiſhes, that this will be the neceſſary conſequence of publication; therefore he muſt be deemed to intend it; for whoever does an act of any kind deſignedly and knowingly, muſt of courſe intend every neceſſary conſequence of that act. To this I might add, that in every language, the words which expreſs the publication of a book, expreſs it as giving it to the public. But in the argument it was contended, that the author gives nothing to the public but the mere peruſal of it; but ſtill preſerves the perpetual right to the work. It was alſo urged, that an author, publiſhing and ſelling a book, is only giving the buyer ſo many keys to the gate, or tickets to the opera; that theſe were only given to the parties themſelves, but would not intitle them to forge other keys or tickets. To this the anſwer is evident, I think; if the author had not publiſhed his work at all, but only lent it to a particular perſon, he might have injoined him that he ſhould ~~only~~ only peruſe it; becauſe, in that caſe, the author's copy is his own, and the party to whom it is lent contracts to obſerve the conditions of the loan; but when the author makes a general publication of his work, he throws it open to all mankind: That is then very different from the caſe of giv-

* This quotation is omitted to be taken down.

ing keys and tickets to particular perſons; the very condition of giving theſe is the excluſion of all other perſons; and theſe keys give the party, to whom they are given, no property to the land they paſs through, or to the opera-houſe; they are given them for a particular time, to give them a tranſient admiſſion. It is like an author lending his manuſcript to particular friends, and who ſtill retains the right over it to recal it, when he pleaſes; but when an author prints and publiſhes his work, he lays it intirely open to the public, as much as when an owner of a piece of land lays it open into the highway. Neither the book nor the ſentiments it contains, can be recalled to the author: every purchaſer of a book is the owner of it, and, as ſuch, he has a right to make what uſe of it he pleaſes.——Property, according to the definition given of it by the counſel, is *jus in re*; and the author by impowering the bookſeller to ſell, impowers him to convey the general property; and the purchaſer of the book makes no ſtipulation about the manner of uſing it. The publiſher himſelf, who claims this property, ſold theſe books without making any contract whatever; what call has he to retrench his own contract, or impoſe ſuch a prohibition? nothing leſs than legiſlative power can reſtrain the uſe of any thing. If the legiſlature meant to reſtrain the right of an eſtate to a particular uſe, though mentioned in the contract, it would be totally void; and if the buyer of a book may not make what uſe of it he pleaſes, what line can be drawn that will not tend to ſuperſede all his dominion over it? if he may not make a copy of it in print, he may not lend it; if he is not to print it, becauſe it will intrench upon the author's profits, ſo an objection may be made to his lending the book to his friends; for he may prevent thoſe friends from buying the book, and ſo the profits will not accrue to the author. With regard to theſe books, the very matter and contents of the book are irrevocably given to the public; they become common; all the ſentiments contained therein univerſally common: and when the ſentiments are made common by the author's own act, every uſe of theſe ſentiments muſt be equally common.

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To talk of reſtraining this gift by any mental reſervation of the author or any bargain he may make with his bookſeller, ſeems to me totally ideal. It is by legal actions other men muſt judge, and direct their conduct; and if ſuch actions muſt import the work being made common, much more if it be a neceſſary conſequence of the act, the work is thrown open; no private tranſaction or claim of the author, can ever controul the neceſſary conſequence; individuals have no power, whatever they may wiſh or may intend, to alter the fixed conſtitution of things. If the author will voluntarily let the bird fly, his property is gone; and it will be in vain for him to ſay he meant to retain what is abſolutely flown. There is another maxim too concerning property, that nothing can be an object of property, that is not capable of proprietory marks. The end for which the firſt inſtitution of property was eſtabliſhed, was not only for the ſake of cultivation, but principally to preſerve the peace of mankind, which could not exiſt in a promiſcuous ſcramble; therefore moral obligation aroſe upon all, that none ſhould intrude upon the poſſeſſion of another: but this obligation would not take place where the property was promiſcuous, and every body knew was open to another; mankind muſt have the pains of preſerving ~~their~~ duty, from the poſſibility of abſtaining from every violation of it; the breach muſt be wilful to make it criminal: it is neceſſary therefore, that every perſon ſhould have ſome marks in his property to denote his propriety therein; for hard would be the law to adjudge a man guilty of a crime, when he had no poſſibility of knowing he was doing the leaſt wrong to any individual: now where are the marks, or what marks has a proprietor on a ſet of intellectual ideas? they have no ear-marks upon them, nor token of a particular proprietor. And if the author's name be inſerted in the title, that is no reaſon; for many of our beſt and ableſt authors have publiſhed their works for more generous views, for fame, and the benefit of mankind; and many others have had ſuch views only for a time, and afterwards left the work open to all mankind;

kind: and on the other hand, if the author's name was omitted in the title page, he might equally inſiſt on the claim; for if the property be abſolutely his, he has no occaſion to bind himſelf by ſuch ties: and how are they to know when any ſuch property is abandoned? in all abandonments two circumſtances are neceſſary, an actual relinquiſhing a poſſeſſion, and an intention to relinquiſh it, ——— but mere mental ideas admit of no actual or viſible poſſeſſion, —— conſequently of no ſigns or tokens of abandonment. The legiſlature had plainly this objection in view, when they penned the ſtatute of Queen Anne, to give author's a temporary property; from the preamble it is thus ſaid, "Whereas, many perſons may through ignorance of-"fend againſt this act, unleſs ſome proviſion is made, "whereby the property may be aſcertained: It is there-"fore enacted, that the title of the book may be entred in "the regiſter-book of the Stationers Company," And from that book the perſon may ſee whether the author intended to make a property of his work; and the duration for it is to commence from that entry; But if the author's have a right at common-law, they need not enter their books; they may wave that: by what marks then muſt this idea of property be diſtinguiſhed? and how will the difficulty encreaſe, if the property extends not only for 14 or 28 years, but for ever! On this ſtatute therefore it appears to me, that this claim of a perpetual monopoly is by no means warranted by the general principles of property; from thence I ſhould have thought, that it could not be a part of the common law of England. But I will now conſider the ſecond general ground on which this perpetual copy-right was argued at the bar, namely, the ſuppoſed uſage and law of this kingdom. Under this head it was contended, that the right of an author to the ſole publication and perpetual monopoly of his work, though it were not maintainable on general principles, is yet a kind of cuſtomary property: It is a right, that has always been allowed and ſupported in this kingdom. If it was ſo, it is ſtrange, that

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in all our laws, where every kind of property is abſolutely diſcuſſed, a claim ſo extenſive as this is not abſolutely eſtabliſhed; and yet it was admitted by the plaintiff's counſel, that they could not produce any one determination in a court of law that had eſtabliſhed any ſuch kind of property. They attempted however to ſet up ſome extraordinary ſubſtitutes to ſupply this deficiency: The firſt of all was the finding this ſpecial verdict; that before the reign of Queen Anne it was uſual to purchaſe theſe copies, and make them the ſubject of family ſettlements. A deſcription thus painted with ſtriking ideas of purchaſe and family poſſeſſions, may at firſt ſight dazzle our eyes, and catch our paſſions in its favour; but when looked fairly at, I truſt we ſhall find it merely deluſion. There are but two caſes in which it can be applyed to the preſent queſtion; either, firſt, eſtabliſhing a cuſtomary property in fact; or, ſecondly, that there was a general idea of ſuch a right antecedent to the ſtatute of Queen Anne. With reſpect to the firſt, it is impoſſible to allow any cuſtomary claim; and is no uſage of which the law can take notice, being merely an allegation of particular contracts which ſome individuals had made before the reign of Queen Anne; but to conſtitute a legal cuſtom it muſt have theſe two ideas:

That cuſtom muſt import ſome diſtinct right, and not the mere private actions of individuals.

And, in the next place, the cuſtom muſt have appeared to have exiſted immemorially; for cuſtoms operate, if they have any operation, as poſitive laws: the mere fact of uſage would be no right at all in itſelf; but when cuſtom has prevailed from time immemorial, it has the evidence and force of an immemorial law.—If cuſtom be general, it is the law of the realm; and if local only, it is *lex loci*, the law of the place. Now all laws are general, ſo far as the law extends; and all cuſtoms of England is of courſe immemorial: no uſage therefore can be a part of that law, or carry with it an uſage that is not immemorial. Here no ſuch uſage is ſuggeſted; it is merely an allegation of particular contracts

tracts made with individuals before the reign of Queen Anne; that prior to that reign copies have been purchaſed for valuable conſiderations, and made the ſubjects of family ſettlements; but how long before, whether 100 years, 50, or 10, is not alledged, very certainly they could not be immemorial, for the art of printing was not known in this kingdom, till the reign of Edward the IV: Therefore theſe contracts could not be derived from the ancient immemorial law of the land; and conſequently they could not create any ſpecies of property which was known to that law. It is indeed inpracticable to draw any inference from ſuch a propoſition; for the verdict does not find theſe rights were ever inforced againſt ſtrangers; the parties would undoubtedly acquieſce in the agreement, and the families on whom they were ſettled, would not reject a ſettlement however chimerical; but unleſs it was ſhewn that the claims have been inforced againſt ſtrangers, no private contracts or family ſettlements can impoſe a law upon the publick.

It is ſaid, theſe ſerve to ſhew there was a general right before the ſtatute of Queen Anne: if the idea had been ever ſo general, what muſt we thence infer? If the laws of ideas muſt eſtabliſh a ſpecies of property, what a vaſt extent! Immenſe ideas of property were made in the South Sea; in that year innumerable rights of this kind were bought and ſold; and that between parties, whoſe ideas were as ſanguine as thoſe of authors; that the ideas they ſold were real property; though really the ſubjects that were ſold were no property.——The good-will of a ſhop, and of an alehouſe, and the cuſtom of the road, as it is called among carriers, are conſtantly bargained for and ſold as if they were property; what are theſe? nothing more than the good-will of the cuſtomers, who may withdraw them the next day.—The purchaſer of this cuſtom or good-will gains no certain property in it; he has no power to confine it to himſelf, or uſe any force to prevent other people from gaining the cuſtom: it is of ſervice, as it gives the purchaſer a priority for cuſtom; ſo it is with the caſe of a publication, it gives

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the bookſeller a priority, and gets a ſet of cuſtomers; but none of theſe caſes can eſtabliſh an abſolute excluſive property: whatever ideas individuals may form, or however they may traffick among themſelves in imaginary claims, they cannot affect the real right of the publick, who are no parties to ſuch contracts. It is a well known maxim in our law, that no man can, by any device whatever, create a new *conſequence* out of an eſtate, or innovate upon the law of the land; he cannot annex to his eſtate any novel conditions that are inconſiſtent with the nature of the eſtate; much leſs can the acts or intereſts of individuals abridge the publick of their natural right, or eſtabliſh monopolys.——The next arguments were the two bye-laws of the Stationers Company; the firſt Auguſt 1681; the laſt May 1694; the former recognizes it: It is material to attend to the words of the bye-laws, or otherwiſe I ſhould not have taken up the time of the court to have ſtated it.

It aſſerts, that divers of the members of the company had great part of their eſtates in copies; and by the uſage of the company, when any books were entered in their regiſter to any of the members of that company, ſuch perſon was always reputed the proprietor of it. The next is the ſame, only with this additional entry, (that after theſe recitals, the two bye-laws for the better obſervation of the ſaid ancient uſage) ordain, that when any entry ſhould be duly made of any book or copy, to, or by, or for any member of the company, in ſuch caſe, if any other member ſhould, without the licenſe of the member for whom the entry is made, print, import, or expoſe to ſale, they ſhall for every copy forfeit 1 s. The view of inſerting this bye-law was to draw the preamble ſomething in favour of copy-rights; and

In the ſecond place, to ſhew that theſe rights were protected by theſe bye-laws.

With reſpect to the firſt, whatever theſe bye-laws had ſuggeſted in favour of this claim, it would be certainly no evidence at all. They are really confined to the members of that

read that company, and could not be pled againſt the preſent defendent, who is no member of their company, and not ſubject to their bye-laws; and theſe are confined too to o theſe books that are entered in the regiſter-book of that company for ſome of this company; and this is ſo founded upon the ancient priviledge of that company. So peculiar a claim is ſo far from being a proof of a common-law right, that it is an argument againſt it; for if ſuch a right exiſted by the common law of the land, it could not be ſpoken of as by uſage of the company: But we are upon a queſtion of law, and that is only to be determined on legal principles, and not upon allegations of ſets of men. It is a matter of queſtion, whether this or that article of property belongs to A. or B; but on a general queſtion, whether ſuch a thing the is a ſubject of property, or does freely belong to all, the law muſt determine: it would be ſtrange indeed, if this great point, that the courts of law have thought to be ſo arduous to determine, were to be decided at laſt by the determinations and opinions of the Stationers Company. As to the ſecond view in which this ſtands, that the author of a book was properly indemnified, this bye-law ſeems as deficient in this view as they were formerly.—— Theſe bye-laws, in the firſt place, have no relation to the claims of authorſhip; the copies they refer to are theſe o copies only which particular members of the Stationers Company have the priviledge to print, either by patents to themſelves, or by licenſe from the Stationers Company: and, in the next place, they don't give protection; they don't pretend to give protection to any, but thoſe of their own company. The offence of infringing theſe rights, o and the penalties, are confined to their own members only; e and that penalty is given to the company themſelves: the whole is nothing more then the corporate regulations of their own company: many members of that company were poſſeſſed of copies, and others had particular allotments from the company for the ſole printing of their own books, and to preſerve proper order among themſelves: the

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books that each member was ſuffered to print, were entered in their regiſter, that every one's claim might be known among themſelves, and they might not intrude on each other's right: ~~that~~ Theſe entries and bye-laws extended no further than to the members of the company; and by theſe bye-laws no author whatſoever had the leaſt pretenſion to copy-right: and even theſe members themſelves could have no right againſt ſtrangers, but only themſelves, for theſe bye-laws provide no remedies againſt other perſons; nor indeed had the company a right to impoſe their reſtrictions to any but their own body: where then is that copy-right they plead for? But other things were urged at the bar: the charters of the Stationers Company; two proclamations of Henry the VIII, and Queen Mary; ~~the~~ two decrees of the Star Chamber; two ordinances made in the uſurpation; and the licenſing act of Charles II.: theſe extraordinary acts of ſtate were quoted as giving protection to copy-rights, and to account for the want of judicial determination. If theſe were material to the deciding this queſtion, they ſhould all, I apprehend, except the licenſing act of Charles the II. have been found by the jury; for all the reſt are particular inſtruments, and, if admiſſable at all, they were matter of evidence, and not of law: they could not come properly before us by way of arguments from the bar, nor can we regularly take notice of them. But I mention this merely for the ſake of precedent and regularity; I mean at the ſame time to wave all objections to it *, and conſider the ſeveral inſtruments themſelves.

Firſt, as to the charters of the Stationers Company, the chief ſtreſs was laid upon a clauſe in the charter of the 36th of Charles the II. which mentions the proprietors of copies entering their books in the regiſter of the Stationers

* It may be inferred at leaſt from what is here ſaid, that this trial was not conducted in the moſt legal and regular manner: and although Sir Joſeph, being one of the judges of this court, did not chuſe to ſay more; yet any other perſon who is intereſted in the deciſion, may bar it from being uſed againſt him as a precedent.

Company, and declares that they ſhould have the ſame right, as had been uſual for a hundred years paſt. The proprietors of books, to whom this refers, were ~~formerly~~ members of the Stationers Company, who had the ſole printing of books by patent; and we ſee by their bye-laws they claim for themſelves and their members a peculiar priviledge in copies; and there is an ancient uſage of the company; that uſage is referred to, and confirmed as the uſage which exiſted for a hundred years paſt: it is not pretended that ſuch right exiſted immemorially; and whatever theſe charters may have ſuggeſted, no charters from the crown, and conſequently no expreſſions in ſuch charters would affect the right of the ſubject: and it would be ſtrange indeed to infer uſage from law of grants made to the Stationers Company. When the prerogative made ſuch extraordinary ſtrides by the ſtatute of Queen Mary, the company were impowered to ſearch the houſes of all printers and booksellers, and to ſeize all books that were contrary to any ſtatute then made, or ſhould be made: are we therefore to conclude, or could we draw any deciſions either legal or hiſtorical, that ſuch ſearches, ſeizings, or imimpriſonments could be legal in themſelves; and as to the protection theſe charters gave to copy-right, they do not pretend to extend to any claim of copy-right, but to ſuch people only as ſhould enter their books in ~~their~~ regiſter. But if authors had any common law right, it would be equally good, whether they entred them or not; for that cannot extend nor abridge that right. The inſtitution that all books ſhould be entered in that regiſter, was merely political; the deſign was to ſuppreſs ſeditious heretical or immoral books. The inſerting in this regiſter the claim of patentees or any others was an original inſtitution of the Stationers Company, and extended no further than to their own members; with reſpect to all others, the priviledges extended not to them, but merely to their own government, and it was by their own bye-laws, which could not extend further than their own Company. The two proclamations,

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clamations, one of Henry the VIII. (as deſpotick a prince as ever ſat upon a throne;) the other by his bigotted daughter Queen Mary; the former was a general proclamation againſt the printing any book whatſoever without a licenſe; and that of Queen Mary from printing what they called *heretical* books; what have theſe to do with the copy-right of authors? Theſe excluſions extend as much to the one as to the other; if the book was offenſive, it was indifferent to the court whoſe it was. As to the patents —— that granted the book to particular perſons for a certain term of years; from hence it was ſaid, it was no innovation in authors to claim this excluſive right. The patents that were aſſerted in this part of the argument, and which were taken from Ames's Typographia, were ſo groſs and abſurd, that one would not have expected ſuch a quotation: Growte had a patent for all maps and charts——— Caxton, Talies and Lintot, for all things contained on one ſide of the ſheet, provided the other ſide was white paper: in all theſe patents there were penalties inflicted, and they had power given them to ſeize all books and ſearch houſes; and to theſe patents a grant was given to the printers themſelves without any regard to the authors, or new compoſitions: and the very name of theſe patents, being patents of printers, and the very limits fixed, ſhew them to exclude all ideas of Literary Property.

Next, we are told of ſome proceedings in the Star Chamber, the very court that would blaſt all precedents that were brought from it; But I will do the gentlemen the juſtice to ſay, they did not mean to aduce them as authorities of that court, but apply them as hiſtorical anecdotes in their favour. It was ſaid, by one of theſe decrees in 1586, that no perſon (it was ordered) ſhould print any book, work, or copy, againſt the true intent or meaning in the letters patent, or prohibition of any known law of England, or other ordinances laid down for the good government of the Stationers Company: and this decree was afterwards by the command of James the I. ordered to be

put into execution. In 1607, it was ordered by decree, that no perſon ſhould print any book, which the Stationers Company ſhould in their books prohibit; and which that company ſhould, by letters patent, have a right of printing. Such were the edicts of that imperious court; and is it poſſible to apply this deſpotic decree to the legal right of authors in ~~that~~ light? Tyrannical and illegal as the Star Chamber was, the ſole juriſdiction they ~~poſſeſſed~~ was in criminal matters reſpecting books, and theſe only, as their decree mentions, in ſuch as were bad: Many of the decrees were of a civil kind; and in that light they ~~conſined~~ all infringements of patents and grants of the crown ~~and~~ contempts of royal authority; and in that idea they ſupported any patent the crown thought proper to grant: for as Lord Coke obſerves, ſuch was the boldneſs of monopoly, that often at the counſel table, ~~of~~ the Star Chamber and exchequer, informations were referred, pretending complaints in not extending their grants of monopolies; for preventing which, my Lord Coke ſays an ordinance was made, which determines, that all grants of monopolies ſhould be governed by common law. In that of James, a proviſo was made, that it ſhould not extend to any grants made concerning printing: Therefore, as to theſe patents, the Star Chamber continued the ſame uſurped power of enjoining obedience, and puniſhing contempts of ſuch kinds of patents as the Stationers Company were the ingroſſers of: To them ſome aſſumed claims, and authorities were allowed to the printing particular books. They were of ſervice to the ſtate in ſuppreſſing any ſeditious books; and as that authority in them, however unwarrantable in itſelf, was kept to them, and the Star Chamber ſecured ~~that~~ to them by the ſtatute of Queen Mary, The Company of Stationers was made a kind of literary conſtables to ſeize all books that were printed contrary to that ſtatute, &c. And, as Mr. Yorke obſerved, in pleading the cauſe of Cambridge againſt Baſkett, when once the company were made abſolute, they attempted to execute thoſe outrages that no body could

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ſubmit to. The Star Chamber inſiſted on an obedience to the Stationers Company; no book was allowed to be printed, till it was entered in their regiſter; and therefore they might ſtop whatever publication they pleaſed: the ſame court were equally zealous in ſupporting the intereſt, as well as the powers of that favourite company; and therefore they exerted the terrors of their authority to inforce the priviledges which had been granted to that company, or any of its members, by patents or charters from the crown; and this they did under their criminal juriſdiction, by puniſhing for diſobedience to their patents and royal grants, &c. They did not otherwiſe interfere where there was no grant to give them a colour for it; of prohibitions; thus this court with all their extravagance, extended only to crown patents, and to the ordinances of the Stationers Company: Can this be any proof at all of the inherent right of authors in copies? a right, which if it exiſts at all, is an original independent right; and are theſe ſo concluſive, as to account for the want of any other determination in their favour, when the whole right was confined to the Stationers Company, or to thoſe that have patents from the crown? The next favourable topic was, the orders made in the enſuing reign; for in this particular, the counſel reciting them, they obſerved, they were founded on thoſe decrees: the law particularly relied on, was taken from an ordinance in 1649, That no perſon ſhould print, or reprint any part of a book that was granted to the Stationers Company without their conſent; nor any book or part of a book which was entered in their books, for any member of the company, without the conſent of the author or the heir thereof. Therefore the deſign of this clauſe, was to ſtop the publication of thoſe papers which the royaliſts publiſhed: the title of the act was for ſtopping unlicenſed ſcandalous publications, &c. And therefore the act enacted, That no book ſhould be publiſhed, unleſs it was approved of by the licenſer: and by the ſame ordinance, and in another in 1662, the Company

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of Stationers were ordered to ſearch for all unallowed printing preſſes employed in printing unlicenſed books, &c.; and likewiſe to apprehend all authors, and ſo forth. The whole of the ordinances from the beginning to the end were adapted to the ſame political views, except to that particular clauſe which is intirely confined, like the Star-chamber decrees, to the privileges which have been granted to the Stationers Company for the maintenance of their poor, and the particular claim of the members of that company. The ſame arguments therefore, of that company claiming to themſelves and members a particular privilege; to theſe grants I ſay the courts were particularly favourable. But there is not a clauſe that ſtates or protects the copy-right of authors; for (except the bye-law of the Stationers Company) they have no protection.—Next to this, the ſtatute of Charles II. was mentioned; that it contained ſuch a protection to authors that they need not ſeek any others; three clauſes of that act were quoted: In the 3d ſection there is a proviſo to the univerſity to print any books that were granted to them; 5th clauſe is, if entered in the regiſter of the Stationers Company, none to have the right of printing: The 23d ſection contained a proviſo of printing. But, how will theſe clauſes avail thoſe authors who are not members of the Stationers Company, nor have any particular grant of excluſive privilege; or if the author had failed to have entered his book, what relief or redreſs could he have had.

For my own part therefore I cannot collect from any of theſe ſeveral inſtruments any authorities, that favour the preſent plaintiff. The patents were enormous ſtretches of prerogative, to raiſe an enormous revenue, and to gratify particular favourites, without the leaſt regard to authors and new compoſitions: And all the reſt of theſe authorities were founded on political views, to prevent, as they declare, heretical and ſeditious publications, &c. And if the order, that all works ſhould be entered in the regiſter of the Stationers Company, were to prevent improper publications

1 The Common Law of England consists in a customary Determination of a Common Law Question;

ens, and had not the view for eſtabliſhing the right of copy to an author, the innocency and delinquency of the work, and not any private property in the author, was the object of their enquiry; and if the licenſer did not approve of the copy, he could ſtop the author himſelf from publiſhing his own compoſition *.

The bye-laws of the Stationers Company protected none but their own members: What ſecurity then have all theſe inſtruments for the copy-right of any author?

I might alſo obſerve on all theſe inſtruments, that theſe expreſs prohibitions plainly imply, that the authors had no protection at common-law; for then it would have given them a competent protection, and all theſe aſſertions would have been needleſs.

I am now come to the laſt reſort of the plaintiff's counſel for ſupporting the plaint; that is, the Injunctions that have been granted by the Court of Chancery. Great attention and reſpect will undoubtedly be due to the deciſion of a Chancellor. But had theſe injunctions, which were only temporary, been concluſive and perpetual; they would have no effect on a court of common law, on a common-law queſtion; by theſe determinations we are bound, and to them we muſt always adhere; for theſe are the proper conſtitutional declarations of the law of the land; they are ſo conſtrued by the Court of Chancery itſelf: For when any doubt ariſes in a caſe in equity, it is ſubmitted to a determination of common law. The very caſe now is ſent here for our determination, becauſe it is a queſtion of common law. The courts of law never applied to that court for their deciſion on a common-law queſtion; and when the court of equity appeals to us, as its being a common-law queſtion, it would ſeem a little ſtrange if we ſhould go back to that

* This is as ſtrong an argument againſt a common-law right of authors to their works, as can well be conceived; the immemorial cuſtom, which the other three judges build ſo much upon, it is plain did not exiſt at this period, which was not many years prior to the ſtatute of Queen Anne, authors then were in a much worſe ſituation than after that ſtatute.

court

court to inquire their opinion upon it; or in other words, if we ſhould anſwer this queſtion they put to us, by making the ſame inquiry there: Yet that would in effect be the caſe. If we were to form our deciſion of this queſtion by arguments of deciſions on the judgments that have been cited; it would be grounding our deciſion on no judgment at all: theſe deciſions were but temporary, till the right ſhould be determined, and none of them contained any expreſs deciſion whatever was ſaid at the bar.—Theſe injunctions were acquieſced in by the defendant; but no acquieſcence of the party can alter the law.

The Court of Chancery would have reaſon to conclude from theſe arguments, as well as we; and they would hardly wiſh to draw deductions from their own deciſions.

Their ſending the caſe to us is a deciſive proof, that the Court of Chancery which granted theſe injunctions conſidered this matter as unſettled. And the caſe of Millar and Donaldſon, which was a caſe depending on common law, Lord Northington would not determine upon it, but left it to be conſidered as a queſtion at common law *. It is plain then, that after all theſe injunctions the grand queſtion itſelf is ſtill, even in that court, conſidered as an undecided point: but as the plaintiff relies ſo much on them, I think it a due reſpect to this gentleman to examine particularly the injunctions themſelves, and ſee whether they have any ſort of influence on the queſtion before us. It is unneceſſary to comment particularly on every injunction: They may be reduced to three claſſes: Firſt, Caſes on private treſpaſs, ſurreptitiouſly or traiterouſly publiſhing what the owner had never made public at all, nor conſented to the publication of.

The ſecond claſs is, Caſes expreſsly grounded on the ſtatute of Queen Anne, and within the terms which that ſtatute has granted. And

Thirdly, Caſes on patents from the Crown for the ſole

* In this caſe (which reſpected Thomſons Seaſons), the injunction was removed.

printing

^ Shebbeare

^ or by Devolution

printing of what are called Prerogative Copies.——Of the first class, were the cases of Webb against Rolles, Pope and Curll, Forbes and Warner, the Duke of Queensberry and Chaloner; they have been all stated; I will not restate them, but only observe, that in all these cases, the publications were surreptitious *, against the will of the owner, before he had consented to the publication of them; and as such they will have no effect on the present question.

Most certainly the sole proprietor of any copy may determine whether he will print it or not. If any person takes it to the press without his consent, he is certainly a trespasser; though he came by it by legal means, as by loan, yet he transgresses the bounds of trust, and therefore is a trespasser. Ideas are free, but while the author confines them to his study, they are birds in a cage, which none but he can have a right to let fly: For till he thinks proper to emancipate them, they are under his own dominion. It is certain every man has a right to keep his own sentiments if he pleases; he has certainly a right to judge whether he will make them publick, or commit them only to the sight of his friends; in that state, the manuscript is in every sense his particular property, and no man can take it from him, or make any use of it which he has not authorised, without being guilty of a violation of his property, and as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority, is guilty of a manifest wrong, and the court have a right to stop it: But this does not apply to the present question. The author had published it many years and received the profits of it.

The second class of injunctions in the manner I range them, relate to injunctions on the statute of Queen Anne. The cases of Naphthali and Curll, Eyre and Walker, Mott and Faulkner, Gill and Willcox, and Tonson and Walker. These are all the injunctions I think recited, which fall in that division in which I have mentioned them.

* The manuscripts were published without the consent of the authors.

As to the case of Nelson's Festivals, and the Whole Duty of Man, whatever the idea of the court may be, I shall let them remain with the observations that have been made by my learned brethren, with this additional one: That let the injunctions be what they may, it was only till the hearing; there was no final decisive judgment: There had appeared some doubt, (for I have seen copies of all these injunctions that were stated in the plaintiff's bill) as to the Whole Duty of Man; that, as a copy right, was entered in the Stationer's register by the plaintiff himself: In 1735 he filed his bill, and founded it on the statute of Queen Anne; whether mistaken or not, is not at all the question: And in the case of Nelson's Festivals there is the like allegation, that it was entered in the Stationers register: but I do not apprehend that either of them would very materially affect the present question, for the reasons I have set out with in the general observations I made; I shall not say any more of them, but leave them with the observations my brethren have made on them.

But with respect to Milton's Paradise Lost, I must mention what I have seen in a note of Lord Hardwicke's. It seems from that, that the injunction was founded on notice only, for his Lordship said, that at first he was inclined to send the cause to the judges to settle the point of law; but as Dr. Newton's notes were manifestly within the 8th of Queen Anne, he would grant an injunction as to these, without deciding the general question of property at common-law. But from these injunctions the plaintiff's counsel deduced this argument in their application of them to the present case; that all these injunctions on the statute were founded on the supposed property in the respective plaintiffs, on the legal right to the several copies to which they related; and that such a property must necessarily be a property in common law; for the statute consists only of the penal provisions, and prescribes the mode of prosecution. To which it might be answered, that these injunctions being temporary only, decided nothing at all: But I will admit they were founded

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^ in all Books published before

^ a sole Right is positively vested in the Author during

^ Lucr

on a right that would ſupport a more general injunction: for by this act of parliament they had certainly a property in their reſpective copies during the term the ſtatute has given; for the ſtatute in the firſt place, before any penal proviſions, affirmatively and diſtinctly enacted, that, by making the ſtatute, the author of any work already publiſhed, or bookſeller, ſhould have a ſole right of printing the ſame for twenty-one years; and the works afterwards to be publiſhed that they ſhould have a right for fourteen years: By this clauſe therefore, the particular terms, are fixed. The ſtatute has limited the ſubſequent proviſions, which have enacted penalties: For the right is wholly confined to the parties intereſted, and the authors and purchaſers of copies, but the penalties are given to any common informer. To the author therefore it is the ſame as a leaſe or grant, or any other common-law right, while the term exiſts, and will equally intitle him to all the common-law remedies for the enjoyment of his right, he may eaſily, I ſhould think, file a bill to ſtop the printing:—but here I might ſay with more poſitiveneſs, he might bring an action for the recovery of ſatisfaction for the injury done him.

And in the caſe of Eyre and Jones, Salkeld 416, the ſame Chief Juſtice obſerves; where the ſtatute gives a right, the party ſhall in conſequence have an action at law to recover it. The author's remedy is very different from an informer's proſecution for the penalty; he muſt purſue all the remedies the ſtatute requires; for in ſuch proſecution the charge is for an offence, and therefore the offence muſt be ſtrictly brought within all the proviſions of the act; but if he only ſeeks ſatisfaction to himſelf as the party aggrieved, there is not any limitation by the ſtatute. I herein give my opinion as a common lawyer, not preſuming to ſay what the Court of Chancery would do on the ſame queſtion.

The third ſort are thoſe that have grants and patents of the crown: Of this ſort are the Stationers Company and Wright, the Stationers Company and Partridge: In theſe caſes injunctions were granted; but theſe, I apprehend,

have no analogy to the private rights of authors; they did claim a right of printing these copies, but not as authors or purchasers compilers, or publishers, but merely as printers of these books under a patent from the crown. This claim is totally different from that of a grant from the crown; for here it is now argued, that authors have a perpetual right to their own copies. In this last case Partridge was prohibited from printing an almanack of his own compiling. The great argument that was drawn from the injunction is this, That there are certain books, such as the Bible, Common-prayer, Acts of Parliament, and the like, which are usually called Prerogative Copies, which the crown has the sole right of publishing: And if the king may have a legal property in these, there is no reason why the public may not claim the sole right of their own compositions. That there is such a right in the crown is undoubtedly true; but this is confined to compositions of a particular nature, and to me seems to stand upon principles entirely different from the claim of an author. It is not from any pretence of dominion over printing that this prerogative right is derived; for the crown has certainly no right of controul over the press; but it is certainly to particular copies that this right does extend; and as no other person is permitted to publish them without authority from the crown, the king is said to have a property in them; but this kind of property has always an additional distinction from prerogative property, and is founded on a distinction that cannot exist in common property. The books are Bibles, Common-prayers, and all extracts from them, such as, Primers, Psalters, Psalms, and Almanacks; these have relation to the national religion. The other compositions to which the king's right of publication extends, are these; the Statutes, Acts of Parliament, and State Papers. I shall now state this right, and that kind of copy right which is claimed for authors in their compositions. The case of Lee which is reported in Shower, where it is claimed, that as the king is head of the church, he has a particular prerogative in printing Primers, Psalters, Psalms and Almanacks;

manacks. In the Stationers Company and Wright, which was for importing and printing Pſalms, Pſalters and Almanacks, the words of the injunctions are theſe: "This court in "reſpect to the well and true printing of Pſalms, Pſalters, "&c. as it is of a great concern to the publick, and great "danger to have theſe books printed in a foreign nation, "by any beſides the patentees and their aſſignees," Therefore an injunction was granted. In the caſe of the Stationers Company and Partridge, The Stationers Company grounded their plea upon the right of the crown, being licenſed by the Archbiſhop of Canterbury for printing of almanacks. In the caſe of the Stationers Company and Godfrey, the court aſſigned their reaſon, that there was no other difference between the almanacks of Godfrey's, and that in the Common prayer Book: They ſaid it was firſt fixt by the licenſe council, and therefore almanacks may be accounted prerogative property: And in a ſubſequent part of their opinion, the court obſerved, that though printing was become a common trade, yet things that were matters of ſtate and concerned the government were not left to any man to print that pleaſed. There are other caſes, as in the caſe of the Company, that had a patent for printing the ſtatutes; The defendant had ſome books printed at Amſterdam, and imported them; they determined, that printing of the laws was a matter of ſtate; but as for the printing the Whole Duty of Man, and ſuch like books, the Lord Chancellor left them to an ordinary courſe. It is aſſerted, that the defendant was not ſuffered to print theſe books, becauſe it was of dangerous conſequence to print theſe books if falſely done. In the caſe of ——— ——— Coke's Reports, I will not quote the ſtate of the Stationers Company, becauſe they are only the arguments of counſel, and moſt of them very abſurd indeed. But in the caſe of Millar and Donaldſon *, which was before Lord Northington in 1765. In the caſes that have been decided in favour of

* This caſe is omitted to be taken down; it was for Thomſon's Seaſons, and quoted by Judge Willes page 20, where the reader will ſee a note upon it.

the

the Stationers Company, the court proceeded on letters patent, where the crown had a right to print all matters of ſtate: From the whole of this, it appears to me, that the right of the crown, in reſpecting what is called *prerogative copies*, is founded on reaſons of ſtate; the only conſequences to which they tend are all of national and publick concern, reſpecting the eſtabliſhed religion or government of the kingdom; for there is no inſtance of the crown maintaining any ſuch right in private compoſitions; it is neceſſary in all theſe claims, that uniformity and order may be duly obſerved, and the ſubject informed with preciſion how to regulate his conduct, and how to be governed. The king has the exerciſe of eccleſiaſtical juriſdiction, therefore it is given to him to exerciſe his power over theſe publications, that no confuſion may be introduced by falſe publications; and as printing, ſince the invention of that art, has been the general mode of conveying theſe publications, the king has always appointed his printer; this is a right which is inſeparably annexed to the king's office; it is not annexed to the copies of any private author. The king does not derive this known right from any of the circumſtances attending the caſe of authors.——It is mentioned in one of the caſes, that ſome of the compoſitions were at his expenſe; but that was no private diſburſement of the king, but part of the expenſes of the government: and it can hardly be contended, that the expenſes of a publick ſort, are the private property of the kingdom, becauſe purchaſed with public money. And how ſhall we determine the other compoſitions, which are not the right of the king; he cannot ſell nor diſpoſe of one of theſe compoſitions; the king's printer is properly an office; it was formerly granted by that name with a fee annexed to it, and the party ſworn into the office; from theſe authorities, therefore I ſay, it ſeems, that the king's property in theſe particular compoſitions ſtands on different principles from that of author, and therefore will not apply.

Now, as the plantiff contends, that this ſuppoſed copy-right is what he is by law intitled to, let us examine what

ſpecies

ſpecies of law that is. It cannot be contended, that theſe are real eſtates; if any claſs at all, they muſt be that ſpecies of property which the law called *chattels*; all chattels properly are goods, and debts; the right cannot be contended for as a debt; the defendant, or publick, are not debtors to the plaintiff; and it cannot be claimed as a contract; the defendant never entered into ſtipulations about it, and this cannot be claimed as any ſpecies of inheritance, nor yet as a debt or matter of contract; there is but one claſs of property under which it can be ranked, and that is goods; but thoſe in poſſeſſion muſt of courſe have ſome viſible ſubſtance, for nothing elſe is capable of an actual poſſeſſion. The authors manuſcript will very properly fall under this claſs of property, becauſe this is corporal; but mere intellectual ideas are totally incorporeal, and therefore incapable of any diſtinct ſeparable poſſeſſion. If theſe are any matters of property, they muſt be ſubject to the ſame ſeveral changes of poſſeſſion, the ſame changes, ſeizures, and forfeitures; the ſame circumſtances, to which all other chattels are liable; can the ſentiments themſelves, apart from the paper on which they are contained, can they be taken in execution for a debt? or if the author commits treaſon, or felony, or is outlawed, can the ideas be forfeited? can ſentiments be ſeized, or by any kind of act be veſted in the crown? and yet if they cannot be ſeized, the ſole right of publiſhing them cannot be confined to an author; for the ideas of forfeiture muſt ever attend the ideas of property; how ſtrange muſt this property be, which cannot be ſeized, nor is ſuſceptible of any exernal injury, nor of any ſpecific, or poſſible remedy? But it was ſaid, that this is a kind of ſpecial right to a particular intereſt, to a particular priviledge. Now by the law of England, there is no ſpecial right, there is no particular priviledge, nor intereſt whatſoever of perpetual duration, but thoſe that have reſpect to ſome kind of inheritance. All perſonal property is total and abſolute, ſuſceptible of no collateral rights or partial intereſts, excepting for a time, as in a caſe of loan or the like. And here another reaſon occurs, why the right now claimed,

claimed, can have no existence in the common law of England, and that is, that the whole of this right in its utmost extent, is a mere action, and right of bringing an action against those that print the author's work without his consent; this action is merely vindictive ——— and there is no maxim in our law more plain than this; that things in action are not assignable property; the law is too tenacious of private peace, to suffer litigations to be negociable; and yet the present action is founded on such a right, a right the author has assigned to the proprietor. The legislature may make a new right: The statute of Queen Anne has vested a new right in authors for a limited time; and while that right exists, they will be established in the possession of their property; but we are now considering a question at common-law; and at common-law, even debts are not assignable to the assignee, to bring an action in his own name; the present action is a debt only, and no debt is assignable in law, or equity: To me therefore it seems, this claim will not fall within any one known claim of law; it cannot be therefore a law-right.

The whole claim that an author can really make, is on the publick benevolence, by way of encouragement, but not as an absolute coercive right; it is similar to that of an inventor of a new manufacture or machine; it is a right of the crown to grant him a proviso for a limited time: but let us consider a little, the case of mechanical inventions, and they stand on the same footing in point of property, whether the case be a mechanical invention or a literary one, whether it be an epic poem or an orrery; the inventor, as well as the author, has a right to determine whether the world shall see it or not: and if he chuses to make a property of it, by selling the invention to an instrument-maker, the invention itself will procure him the benefit of it: But when the invention is once made known to the world, it is then publick; every purchaser of an instrument, has a right to make what use of it he pleases: for in this point, if the inventor has no patent, any person

ſon whatever may copy the invention, and ſell whatever copy he pleaſes: yet every argument that can be urged for the invention of an author, may be urged for the inventor of a machine; he may uſe the ſame arguments of having a right to his own productions. Mr Harriſon, who I mentioned before, diſpoſed of as much time, labour and ſtudy, as Mr. Thomſon might do in writing his Seaſons; for in planning that machine, all the faculties of the mind muſt be fully exerted; and as far as value is a mark of property, Mr Harriſon's time piece may be as valuable in itſelf, as Thomſon's Seaſons; ſo it will equally apply, the inventor of this, or any other, may as plauſibly inſiſt, that, in publiſhing their new inventions, they give nothing more to the publick, than merely the uſe of their machines; that the inventor has the ſole right of ſelling the machine he invented; that the purchaſer has no right to multiply, or ſell any copies: he may argue, that though he is able not to bring back the principles to his own ſole poſſeſſion, yet the property of ſelling the machines juſtly belongs to the original inventor; yet with all theſe arguments, it is well known no ſuch property can exiſt after the invention is publiſhed.

From hence it is plain, that the mere labour and ſtudy of the inventor, how intenſe and ingenious ſoever it may be, will eſtabliſhed, no property in the inventor, will eſtabliſh a right to exclude others from making the ſame inſtrument, when once the inventor has publiſhed it. On what ground then can an author claim this right, when eſpecially, we conſider this iſland as a place of commerce, we can hardly ſuppoſe that our laws give a higher right, or more permanent property to the inventor of a book, than to a new and uſeful machine. Improvement in learning, is a ſpecies of property unknown to the common law of England, whoſe uſages are immemorial, and whoſe voice extends to the advantages of the perſons of the people, and not to the improvement of the mind. When the genius of this nation took a liberal turn, and learning had gained an eſtabliſhment among us, it was the office of the legiſlature alone

to make ſuch proviſions for its encouragement as to them ſeems proper. They have done ſo in the ſtatute of Queen Anne; which Lord Hardwicke is ſaid to have cited in the caſe of Millar and Midwinter, againſt the Scots bookſellers, as an univerſal patent for authors. Let us look into that act of parliament, and ſee if we can find more authentic declaration of the law concerning this right, than from the charters and bye-laws of the Stationers Company, the proclamations and patents of the crown, the decrees of the Star Chamber, the ordinances made in the uſurpation, or the licenſing act of Charles the II.; for this ſtatute of Queen Anne, was made by a legal regular authority, without any mixture of political views. The counſel for the plaintiff were aware, how deciſive this ſtatute was againſt them; therefore they endeavoured to preclude all arguments from it: Therefore they quote the 9th ſection, that nothing in that act ſhould extend to any right, that the Univerſities, or any other perſons, have in any book already, or after to be printed: But this ſaving clauſe, ſeems to me, to have no view at all to any general queſtion of law, or to any general claim; it is not giving any right or claim, which authors might have at common-law, for that would have nullified the whole act of parliament *, and defeated the very end for which it was made; the deſign of the ſtatute was to veſt a copy right in authors, and eſtabliſh that right; but if the act had ſaid after all, that this act was not to have any effect to the poſſeſſion of authors, what laborious nullity would that be?

The proviſo is, that the act might not confirm, or reſtrain any claim by patent. The univerſity will hardly be conſidered as an author, but has the priviledge of printing and reprinting particular books; and undoubtedly there were ſeveral ſorts of books, ſuch as Bibles, Common-prayers, and Law-books; and as we have ſeen a licenſe given for all

* See Lord Kaimes's Remarkable Deciſions of the Court of Seſſion, and this very caſe of Midwinter againſt the Scots bookſellers, where the author is of the ſame opinion with Judge Yates, with reſpect to the rights of the univerſities, &c.

books

books to the Univerſity of Cambridge, and as ſome of theſe patents might be diſputable, as we have ſeen in the caſe of Baſkett and Cambridge, and the patent-rights ſtood on a different foundation than the copy-rights veſted in authors, it was a proper proviſion, that this act ſhould not affect theſe particular claims; that it ſhould not eſtabliſh, nor abridge the duration of patents. So in one of the ordinances of parliament in 1662/ for laying a reſtriction on printing, &c. there is a like proviſo, that that act ſhould not extend to infringe the juſt priviledges of the printers of the two Univerſities. So in the ſtatute of James the II. which makes void all ~~ſtatutes~~ Patents except the proviſion of 14 years, there is a clauſe, that it ſhould not extend to any patents that were made before for printing, that is, that ſuch patents ſhould neither be prejudiced nor confirmed by that act of parliament. It was ſaid, that this ſtatute of Queen Anne was merely declaratory of a common-law right, and only introduced ſome additional remedies; but to me, from the title to the end of the act, it ſeems very clear to be a declaration, that no ſuch title exiſted at common-law; The act ſeems to me deſigned to veſt the property in the author, and in the publiſher, during the term preſcribed by that act; the deſign ſeems plainly to be, to give enconragement to learning, and this, by veſting the copy in the authors and publiſhers: does not this plainly imply, that they had no ſuch right before? how could it be ſaid this act veſted that right, if they had the ſame right before by common-law? In the enacting clauſe preceding penalties, it is ſaid, that after the 10th of April 1710/ the author or publiſher ſhall have the ſole right of printing for 21 years/books then in print, and for books printed afterwards 14 years; does not this imply they had no ſuch right before that 10th April 1710? There is not one general clauſe or indefinite expreſſion throughout the whole that means a previous particular or excluſive right to eternal monopoly; the monopoly is particularly preſcribed to be 14 years, and that it ſhall continue no longer, and the only

prolongation that is given is, that if the author is alive for 14 years, the priviledge ſhall recur to him for another 14 years; and this ſtatute is referred to as another authority for limiting the price of books. If authors have a ſole right to their copies for ever, what encouragement will they have from this act of parliament; it would be a ſtrange encouragement to abridge an actual right, to deprive them of the natural right, which every other perſon has for fixing the price of the goods he ſells; then to ſubject the price of their property to the regulation of others; and what is the penalty for? one half to the king, the other to the informer, and not to the author: the author is expreſsly required forthwith to make waſte-paper of them; were theſe then the encouragements and remedies which authors and bookſellers were ſo anxious to obtain? ſo little do they regard them, that we ſcarce ever hear of an inſtance of their reſorting to theſe penalties; how then can we deſcribe this act, but by veſting in authors a property in their works, which they had not before? After ſtating theſe clauſes and expreſſions, I cannot but conclude, the legiſlature conſidered theſe copy-rights as a matter ———; and that authors could have no right in their copies, after they had made their works publick; and that this was the idea of the legiſlature, is plainly ſeen in the debate * before it paſſed into a law; the bookſellers petitioned that they might have their rights ſecured to them; the committee expunged that word, and the houſe determined the title ſhould be, for the encouragement of learning, by veſting the property in the author and bookſellers; and afterwards when the Lords would have it ſtruck out, the reſtraining the authors, reſpecting the prices, they came to a conference; the commons ſaid, they thought it reaſonable that ſome proviſions ſhould be made, that they do not ſet extravagant prices on uſeful books; the Lords gave it up; and they conſidered it certainly, that without this ſtatute, authors had no excluſive right whatſoever, and therefore could not ſet up an eternal mo-

* See Journal of the Houſe of Commons, vol. 16th, anno 1709-10.

nopoly;

nopoly; but as the act gave them a temporary monopoly, they might have theſe proviſions: but if this act of parliament was merely the recognizing of a common-law, every perſon might wave this act; and then the reſtrictions in this act of parliament would have no operation upon it. Upon the whole, it ſeems evident to me, that this claim cannot poſſibly be maintained on either of the grounds on which it was argued; that ſo far from being warranted by the general principles of property, every one of theſe principles are flatly againſt it; that it cannot be a part of the common-law of England, whoſe exiſtence is immemorial, and long antecedent to every circumſtance of literary claim.

I ſhould have here cloſed my opinion, and am indeed aſhamed, I have taken ſo much time; but it will be ſome apology for the ſingularity of my opinion, as I have the misfortune to be alone * in it, to ſay at leaſt ſomething plauſible on the opinion I have formed. Be my opinion ever ſo erroneous, it is my ſincere opinion; and the grounds on which I have formed it muſt be judged of: and as the counſel for the plaintiff inſiſted on the unfortunacy to men of learning, I will alſo ſay a few words upon that topic, and of the conſequences the publick will feel, if this claim ſhould be eſtabliſhed. It was argued, that the allowance of a perpetual excluſive right to authors would encourage publications, and be of uſe for the explaining and cultivating of human ſcience. It is of uſe certainly, that all human ſcience ſhould be encouraged, and every man's labour properly rewarded; but every man's reward has its proper bounds; and ſurely an intire monopoly for 28 years is encouragement enough. The legiſlature have thought it ſufficient, and have expreſsly declared, they ſhall have it *no longer*. have we any power to controul that authority, and ſay in direct oppoſition to the ſtatute, that they ſhall have it

* This is meant, with reſpect to his other three brethren of the King's Bench; for almoſt the whole of mankind are of the ſame opinion with this very learned Judge.

longer,

longer, that they ſhall have it for ever? If the encouragement, that the act of parliament has given them, will not ſatisfy authors, it is not our province to extend it further; but I can never entertain ſo diſgraceful an opinion of learned men, as to imagine, that the profits of publication for 28 years will not content them: I will not believe, that nothing will induce them to write but an abſolute perpetual monopoly; that they have no benevolence to mankind, no honourable ambition of fame, no intention to communicate their knowledge to others; but the moſt avaricious and mercenary motives; from authors ſo very illiberal the publick would hardly receive much benefit. Now, let us look to the conſequences of this claim on the other ſide, that inſtead of propagation of literature it would ſtop it; it was a juſt obſervation of Lord Northington, that it might be dangerous to veſt an excluſive property in authors; for as that would give them the ſole right to publiſh, it would alſo give them a right to ſuppreſs; and then theſe bookſellers that are poſſeſſed of the works of the beſt of our authors, might totally ſuppreſs them; which would be of fatal conſequence. The publick have certainly a right to them; but the publick, it is certain, have no tie upon authors to oblige them to keep a ſufficient number of copies printed. It was ſaid, that if the authors or bookſellers did not take care to print a ſufficient number of copies, it would be abandoning the copy; to me, however, ſuch abandoning of a copy, in a ſpecies of property like this, ſeems impoſſible; for if there is any abandoning the property at all, it muſt be upon this foundation, that a man has a right to publiſh the ſentiments of an author without his conſent; it is in that right alone that an author can claim the ſole right of publication: Suppoſe an author ſhould drop all deſigns of making future gains to himſelf, and diſcontinue the publication, he may inſiſt, the ſentiments are his, and no other perſon ſhall publiſh his own thoughts without his conſent; notwithſtanding he has publiſhed them once, he does not chuſe they ſhould be publiſhed any further; and in that

light, what colour will there be for extorting his conſent under the idea of an abandonment? But admit this extraordinary propoſition, that an author may abandon the future profits of publication, that is, abandoning what he never was poſſeſſed of; and we ſhould ſtill find the publick would be laid under difficulties; the publick would be liable to diſagreeable conſequences; as this is not only known to authors, it muſt reſt on circumſtances that are of the moſt perilous grounds; they are capable not only of erroneous, but arbitrary interpretations. What a hazard then muſt every man riſk, who ventures from mere argumentative circumſtances, to infer an abandonment, and under that idea proceeds to publiſh! Whatever concluſion he may have formed to himſelf, he knows not what light it may appear in to others; and after an expenſive litigation about it, may find it at laſt determined againſt him. But beſides theſe difficulties, ſuppoſing the author ſhould continue the publication, and print a ſufficient number of copies, but ſhould fix an ſuch exorbitant price upon his books that might lock the work up from the general bulk of mankind, and yet it cannot be ſaid he had abandoned his property; in that caſe all the learning would be confined to a few; and yet no other perſon muſt preſume to publiſh. It may be ſaid, that if the author or bookſeller ſets a price too high, the book would not ſell, this would oblige him to reduce it; and ſuppoſing it ſhould not, what remedy has the public? The legiſlature were aware of this, and therefore eſtabliſhed an authority by the ſtatute of Queen Anne to fix the price of books*; but if authors were allowed a ſole right of publiſhing, that proviſion would be totally nugatory; and it would be ſtill in the power of a bookſeller to ſet an extravagant price on uſeful books: can this excluſive right of publication, which claims an entire dominion, and puts an abſolute prohibition on every perſon, I ſay can ſuch a monopoly as this be deemed

* At a ſubſequent renewal of this act, that clauſe for fixing the price was left out, and now the booksellers, having no check, fix the moſt exorbitant prices on new publications.

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an encouragement of the propagation of learning? There is another light too, in which the conſequences of this claim will be highly injurious to the public; and that is, the reſtraints it will lay upon the natural rights of mankind. It is every man's right to follow a lawful employment for the ſupport of himſelf and his family: Printing and bookſelling is a lawful employment, and therefore every monopoly, that would intrench upon theſe lawful employments, is a reſtraint upon the liberty of the ſubject; and if the printing and ſelling of every book that comes out may be confined to a few, and for ever with held from all the reſt of the trade, what proviſion will the bulk of them have for their reſpective families?

There is yet another miſchief that reſults from this claim. —The door it will open for perpetual litigation. I have before obſerved the dangerous ſnares which this idea of property will lay, as it carries no proprietory marks in itſelf; and by common law is not bound to any formal ſtipulation; ſo obſcure a property, and eſpecially after the work has been a long time publiſhed, might lead many bookſellers into many litigations; and in ſuch the moſt doubtful queſtions might ariſe; whether the author of a work did not intend it as a gift to the public; whether ſince that he has not abandoned it to the public, and at what time.

Diſputes alſo might ariſe among authors themſelves, whether the work of one author were or were not the ſame as thoſe of another author, but only colourable differences; a queſtion that would be liable to great uncertainties and doubts; and of the caſe of thoſe who ſhould compile notes on a publication, and ſhould inſert the text, that author might be liable to an action for it; or if the notes were good, the author might refuſe the publication of them.——I wiſh as ſincerely as any man, that learned authors may have all the encouragements, and all the advantages that are conſiſtent with the general rights and good of mankind: But if the monopoly now claimed be contrary to the law of property, and totally unknown to the ancient

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and common law of England; if the eſtabliſhing of this claim will directly contradict the legiſlative authority, and introduce a complex ſpecies of property, contrary to the end for which the whole ſyſtem of property was eſtabliſhed, it will tend to imbroil the peace of ſociety with frequent contentions, moſt highly diſfiguring the face of literature, and highly diſguſting to a liberal mind. And,

Laſtly, if it ſhould ſtrip the ſubject of his natural right; I ſay if theſe, or any of theſe miſchiefs could follow, I can never concur in eſtabliſhing this claim. The legiſlature have provided the proper encouragement, and at the ſame time guarded againſt all thoſe miſchiefs; to give that encouragement and liberal conſtruction, is my duty as a judge, and will ever be my own moſt willing inclination; but it is equally my duty, not only as a judge, but as a member of ſociety, and even as a friend to the cauſe of learning, to ſupport the limitations of the ſtatute. I ſhall therefore conclude in the words of the act of parliament: "That "the author or bookſeller ſhall have the ſole right for the "particular terms which the ſtatute has given, but no lon-"ger;" and conſequently that the plaintiff, who claims a perpetual and unbounded monopoly, has no legal right to recover.

LORD C. J. MANSFIELD *.

THIS is the first instance of a final difference of opinion in this court ever since I sat here: every ordinance, rule and judgment has been unanimous: that unanimity never could have happened, if we did not all amongst ourselves communicate our sentiments with great freedom; if we did not form our opinions without any prepossession to first thoughts, and with the greatest openness and conviction, and yielding to each other. We have all equally endeavoured at that unanimity on this occasion; we have discussed the matter over several times, I have communicated my thoughts at large in writing, and I have read the three arguments which have been now delivered †. To go over the same topics which were mentioned in the two first arguments, when I previously concurred in and approved of them, would be very idle, and a very nugatory repetition. To attempt to answer the particular parts of the last argument which I have read before, (as to which I differ either as to premises or the conclusion, or the application of them to this case, when I previously know that we must continue to differ,) would I think be unbecoming; and would look too much like pleading, and have too much the air of altercation; and therefore I will content myself with only referring to the two first arguments, and desiring to be understood to repeat them; and in something perhaps a new light, making a few observations on what has been all a-

* We must refer the reader to the foregoing opinion of Sir Joseph Yates, where every thing material in this of L. M's. is answered in a satisfactory manner.

† The reader will easily see how dangerous this practice of one judge's dealing with another, to bring him over to his opinion may be. An able man, in bad times, might persuade a weaker brother to subvert the laws, and ruin the constitution. Such were Empson and Dudley, who were deservedly hanged for it; and such was Jefferies; but it is lucky in these times, that no evil is to be feared from any of our judges.

long

long admitted on the part of the defendant/ in the different ſhapes of this argument/ for the purpoſes either expreſsly admitted, or which cannot, and therefore never have been denied. Concluſions follow in my apprehenſion deciſive/ upon all the objections raiſed to the property of an author in the copy of his own works/ by the common law. I uſe the word *Copy* in the technical ſenſe, in which that name or term has been uſed for ages both ~~by the~~ in Diſcourſe in and ~~the~~ public acts and inſtruments, to ſignify an incorporeal right to the ſole printing and publiſhing ſomewhat intellectual communicated by letters; and whenever I uſe the word, I uſe it in that ſenſe; which I mention to avoid ambiguity, becauſe there is another wider ſenſe to be put upon that word; but I always mean to be underſtood to uſe it in this technical ſenſe, according to this definition. Now it is, and it has all along been expreſsly admitted, that by the common law an author is intitled to the copy of his own work, until it has been once printed and publiſhed by his authority; and that the four caſes in Chancery are agreeable to the common law; and a relief properly given in conſequence of a legal right of property in the copy; this abridged, is equally an incorporeal right to print a ſet of intellectual ideas or modes of thinking/ communicated in a ſet of words and ſentences/ and modes of expreſſion; and is equally detached from the manuſcript or any other phyſical exiſtence whatever. The property thus abridged is equally incapable of being violated by a crime indictable: In like manner it can only be violated by another's printing without the author's conſent, which is a civil injury; the only remedy is the ſame, by an action on the caſe for damages, or a bill in equity/ for a ſpecific relief; no action of detainer, or trover, or treſpaſs/ *vi et armis* can lay; becauſe the copy thus abridged is equally a property in notion, and hath no corporeal tangible ſubſtance. No diſquiſition, no transfer of paper on which the compoſition is wrote, marked, or impreſſed, though it gives the power to print and publiſh, can be conſidered to convey the copy without

the author's expreſs conſent to print and publiſh, much leſs againſt his will. The property of the copy thus deſcribed may equally go down from generation to generation, and poſſibly continue for ever; though neither the author nor his repreſentative ſhould have any manuſcript whatever of the work, original, duplicate, or tranſcript. Mr. G—— was undoubtedly intitled to the paper tranſcript of Lord Clarendon's hiſtory, which give him the power to print and publiſh it after the fire at Peterſham, which had deſtroyed one original; this might have been the only manuſcript of it in being. Mr. G —— might have thrown it into the fire if he pleaſed; nobody had any right to object to it; he might have deſtroyed it. But at the diſtance of near an hundred years, I believe, within three or four of an hundred years, the copy was adjudged the property of Lord Clarendon's repreſentatives; and Mr G ——'s printing and publiſhing of it without their conſent, was adjudged an injury to their property; for which in different ſhapes he paid very dear. Dean Swift certainly was the proprietor of the paper on which Pope's Letters were wrote: I know Mr. Pope had not the papers on which they were wrote, and a very imperfect memory of their contents; which made him more anxious to ſtop their publication, knowing the printer had got them.

If the copy belongs to an author after publication, it certainly belonged to him before; but if it does not belong to him after publication, where is the common law to be found, which ſays, there is ſuch a property before? All the metaphyſical ſubtilties of the nature of the thing may be equally ~~of~~ ~~subject to~~ property before publication: it is incorporeal, and relates to ideas detached from any phyſical exiſtence; ~~there is no doubt~~ another may have had the ſame thoughts upon the ſame ſubject, and expreſſed them in the ſame language *verbatim*: At what time, and by what act does the property commence? What, does a man ſeize the ideas the moment he has clapped them down upon paper, ſuppoſe another man has clapped down the ſame ideas on paper? Or there

there are no Indicia:

there might be such a thing as this:—it is said of Pascal, that without ever seeing the book, he went as far as the 43d proposition of Euclid; I say, without ever seeing the book: So if any body had gone on in Newton's Principia, why then that is a matter of proof, for the same string of questions may be asked on the property of a copy before publication; is it real or personal? does it go to the heir or executor?

There was my Lord Clarenden's, a hundred years, it might be a thousand years, cannot have forfeited this, and do they go in execution? can it be vested in the assignees of a commission of bankruptcy? all the same questions go to this. The common law, as the copy before publication cannot be found in usage or custom before the year 1732. The case of a piracy before publication never appeared to have existed in England.——It never was put; it never was supposed; there is not a syllable about it to be met with anywhere. The regulations of ordinances, and the acts of parliament, taking in the acts of Queen Anne, and the cases of Westminster hall, all relate to the books printed and published; consequently after publication, since 1732 there is not a word to be traced about it, except of the four cases in Chancery, the injunctions that had been granted, or had continued to the hearing of the cause, which is the form of them, I need not state them, (recites the cases) Besides, if all England had allowed this property two or three hundred years ago, the very same objection would hold: the usage is not immemorial; for printing was introduced in Edward IV. or Henry VI. From what source then is the common law drawn, which is admitted to be so clear in respect to the copy before publication? notwithstanding all these objections, from what source is it drawn? From this argument, what is agreeable to natural principles is common-law; what is repugnant to natural principles is contrary to common-law; but it is agreeable to natural principles, that an author should have a copy of his own works before publication: Why? because it is just he should reap the fruits and profits of his own ingenuity and labour; it

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is juſt another ſhould not uſe his name without his conſent; it is fit he ſhould judge when to publiſh, or whether he would ever publiſh it; it is fit he ſhould not only chuſe the time, but the manner of the publication, how many, in what volumes, what print; it is fit he ſhould chuſe to whoſe care he would truſt the accuracy and neatneſs of the impreſſion; in whoſe honeſty he would confide, not to foiſt in additions; with other reaſons of the ſame effect. I allow them ſufficient to ſhew, that it is agreeable to the principle of right and wrong, the fitneſs of things, convenience, policy, and therefore to the common-law, to proteſt the copy before publication: But the ſame reaſons hold, after the author has publiſhed; he can reap no pecuniary profit, after the time his work comes out; it may be pirated every moment from that inſtant; it may be pirated on worſe paper, and printed in a cheaper volume. The eighth of Queen Anne is no anſwer; we are conſidering the common-law on principles before, and independent of that act; and therefore the common law muſt be argued on principles that exiſted independent of that act; then in half an hour, the edition may be pirated; and the author, inſtead of receiving any profit, might loſe the expenſe he had been at, in ſpite of any thing he could do.* The author is no more maſter of his name; he has no controul over the correctneſs of his work; he cannot guard againſt additions; he cannot retract errors; he cannot amend the edition, nor any part of the edition; any one may print an edition againſt his will and conſent, and may perpetuate ſentiments which he diſaproves, repents, and is aſhamed of; he can exerciſe no diſcretion as to the manner in which, or the perſons by whom his work ſhall be publiſhed. For this, and many other reaſons, it ſeems to me juſt and fit to protect the copy after the publication. All objections, which hold as much to the kind of property before, as the

* The act of Queen Anne was made to prevent this abuſe, the author's right, prior to it, being ſo uncertain: See Judge Yates on this particular, page 79, &c.

ſpecies

ſpecies and kind of property after publication, go for nothing, becauſe they prove too much. There is no peculiar objection to the copy after publication; unleſs it is ſaid, that the copy is neceſſarily made common, after the book is once publiſhed. Does a transfer of the property of the paper on which it is printed, neceſſarily underſtand a transfer of the copy, more than the paper on which the book is wrote? The argument turns in a circle, in my apprehenſion. The copy is made common, becauſe the law does not protect it; and the law cannot protect it, becauſe it is made common. The author does not mean to make it common; it is againſt his will; it is found here, he did not mean it; if the law does ſay he ought to have it after publication, it is eaſily aſcertained and ſecured. The whole then muſt finally reſult in this queſtion; whether it is agreeable to natural principles, including in it convenience and policy, as well as moral juſtice and fitneſs, to allow him the copy after publication as well as before? Now as to that, the general conſent of this kingdom for ages is on the affirmative ſide; the legiſlative authority has taken it for granted, and impoſed penalties to protect it: The ſingle opinion of ſuch a man as Lord Coke *, ſpeaking after much conſideration on the point, is ſtronger than any inferences of a Grotius or Puffendorff, or any ſuch great names about gathering acorns and ſeizing a piece of waſte ground: It is very difficult ſpeaking of a ſtate of nature before the uſe of letters. Theſe eminent and great men who granted or continued injunctions in caſes after publication, not within the 8th of Queen Anne, uncontradicted by any book, judgment, or ſaying, muſt weigh exceedingly in any queſtion of law whatever: if it was a queſtion of mere poſitive law †, it muſt weigh exceedingly; but much more in a queſtion

* The opinion of ſuch a man as Judge Yates is certainly as good as Lord Coke, or any other perſon dead or living; his judgment is directly oppoſite to this concluſion, and the practiſe of all nations in Europe is on his ſide; authors in France, Spain, and Italy, are protected after publication by patent for fourteen years only.

† It is certainly a queſtion of mere poſitive law, and ſo underſtood by all the authors who have wrote on this ſubject, ſuch as Lord Bankton, Lord Kaimes

ſtion like this of mere theory and ſpeculation, as to what is agreeable or repugnant to natural principles; and they are equal in my opinion to any final decree whatever. Whoever has attended the Court of Chancery knows, that if an injunction is granted, or continued after the anſwer comes in, it is exactly on the ſame ground that the decree would proceed to a hearing; and unleſs the defendant can vary the caſe, the decree at the hearing muſt neceſſarily follow before the ſame judge, unleſs he varies from that opinion he was of when he granted the injunction. There is a material difference between an injunction againſt proceedings at law, and of waſte: No Chancellor ever granted an injunction to ſtay waſte, if he doubted of the legal property; it cannot be, becauſe you injure the defendant with redreſs one way, and the plaintiff his defence another: No counſel ever adviſed the defendant to go on to a hearing if he could not vary the caſe; if he differs from the court, he appeals on it; and many great queſtions have been determined on appeal. The court grants an injunction, becauſe the court are of opinion, that the plaintiff has a legal right *, and the other is committing a waſte againſt him; and it cannot come to a rehearing, unleſs you can impeach the plaintiff's right, or excuſe by ſome licenſe or other what the defendant has done; that is ſeldom done; becauſe his own anſwer is. This cauſe is not ſent here from the Court of Chancery †; there never was a doubt in the

Kaimes, Sir Joſeph Yates, Dr. Burns in his Eccleſiaſtical Law; alſo the practice of the Chancery in the times of Lord Hardwicke, the Earl of Northington and Lord Camden, &c. See this matter fully ſtated in the appendix.

* This caſe was a reference from the Chancery to the King's Bench: if the Court of Chancery looked upon the point to be already decided by their own practice, Judge Yates ſays, it was abſurd to ſend it to the King's Bench. See the former opinion, page 71, and 72.

† Theſe inferences from injunctions are curiouſly twiſted: it is well known that injunctions are too often granted on mere motion, without the defendant's being called to anſwer; ſuch was the caſe in Pope's Homer, Thomſon's Seaſons, and Swift's Works, in all which Donaldſon was defendant, and all of theſe injunctions were removed (upon giving in anſwers) by Lords Northington and Camden.

Court

Court of Chancery, till that doubt was raiſed from decency to a ſuppoſed doubt in this court, in the caſe of Tonſon and Colins. There is not an inſtance of an injunction refuſed till upon the grounds of that doubt. The ſolemnity with after which it was argued twice, and after the ſecond argument referred to the Exchequer Chamber to be argued before all the judges, a colluſion was ſuſpected, which came out to be the caſe; that was ſufficient ground for the Court of Chancery to ſay, the property is doubtful. The Court of Chancery did not ſend it to law; they left the party to follow his legal remedy; it is doubtful ſay they; it has hung in this court, ſettle your legal right, and then afterwards you may come here. Can there be any thing more ſtrong, ſuited to ~~the conduct of my Lord Talbot, &c. Sir Joſeph Jekyl ſat in parliament at the time of the act of Queen Anne.~~ The injunctions were refuſed, and properly and rightly refuſed, becauſe it would be committing an iniquity to grant an injunction of this kind in a doubtful caſe. If then it is agreeable to natural principles, to allow a copy after publication, I am warranted by the admiſſion, which allows it before it is publiſhed, to ſay, this is common-law. There is another admiſſion, which in my opinion is equally concluſive; and it has all along been admitted, that by the common-law, (for there is no act of parliament in that caſe whatever) ~~that by the common-law,~~ the king's copy continues after publication; and that the unanimous judgment of this Court between Baſkett and the Univerſity of Cambridge, The king is right. has no property in the art of printing; the ridiculous conceit of Atkins was exploded at that time. The king has no authority to reſtrain the preſs in any caſe whatever, on account of the ſubject matter, on which an author writes, or his manner of treating it; the king cannot by law, grant any excluſive priviledge to print any book whatever, which does not belong to himſelf *; crown copies are, as in the

* If this doctrine is found law, then all patents for books granted by the crown (excepting for prerogative copies) muſt be illegal.

caſe of an author, civil property; which is deduced, as in the caſe of an author, from the king's right of original publication; this kind of property in the crown, or a patentee from the crown is juſt the ſame; incorporeal, incapable of violation but by a civil injury, and only to be vindicated by the ſame remedies, an action upon the caſe, or a bill of equity. There were no queſtions in Weſtminſter-hall, as to the crown copies, before the reſtoration; the reaſon is very obvious; it will occur to every one that hears me; but the fact is ſo, there was none before the reſtoration. Upon every patent which has been litigated ſince, the counſel for the patentee (notwithſtanding, that between the reſtoration and revolution) throw out, and they were countenanced in throwing out, prerogative notions, and power. Though they threw them out, and had countenance in thoſe caſes from the Court of Chancery, and a little too in the Courts of Law, to throw them out; yet notwithſtanding that, they always torture their invention to property. In Roll's abridgment, they argued, that the year books, which are abridged in Roll's abridgment, were at the king's expenſe, therefore his property; and the printing belonged to his patentee: In Croke's Reports, they contended, the king paid the judges who made the deciſions; *ergo*, the deciſions were his: the judges of Weſtminſter hall thought they belonged to the author, that is, to the purchaſer, or the executor of the author; but ſo far the caſe turned on property. In the caſe —— firſt Modern 256: Pemberton, beſides arguing from the prerogative, he likewiſe argued thus; Almanacks have no certain authors, and then they belonged to the king: It was far fetched, and it is truly ſaid, the conſequence did not follow that the property was common. Pemberton, a very able Lawyer, ſaw the neceſſity of getting at property if he could, to make it out. The caſes in Chancery that have been mentioned before the revolution, that the Stationers Company, ———— ſo extravagant, that were the Chancellor to make a perpetual order for e-

Unluckily ſeveral words have been omitted by the ſhort-hand writer, particularly in this page.

ver,

Stationers Co.

how far they went &c upon good grounds; &
rather &c

ver, on motion; there never exiſted ſuch a thing; it is an extravagant idea to be ſure. Now as to all theſe caſes, the judgments of common-law upon Almanacks, they are all of no weight in the caſe, and all the doctrine of prerogative rejected by what was done in the caſe of the Stationers Company and Partridge, when that came on in the year 1709 before Lord Cowper, on continuing the injunction; there is no note that I have ſeen upon it: I have read the bill, and the anſwer; there the bill puts it upon all the prerogative notions of power, and quotes ——— and Stationers Company * ——— and Stationers Company, and ——— the king's patentee had a ſole exclusive right of printing authors; the anſwer was, that theſe were extravagant illegal notions, that they were at times when the prerogative ran high, and at the ſame time when the diſpenſing power was allowed; and they inſiſted on that queſtion ſince the revolution being argued on proper principles, with regard to the rights and priviledges of the ſubject, and they deny all theſe caſes as to prerogative right; how far they went into the argument, and how far Lord Cowper thought himſelf bound by theſe ſeveral judgments; if he did think ſo, he thought right upon good ground. I have office copies of all the orders and pleas that have been cited on this occaſion: I dare ſay, I have thirty or forty of them; there it appears on order, that theſe decrees were all read; that the judgment of the Houſe of Lords was read and gone through. My Lord did not chuſe to undertake, in the caſe of Almanacks, to decide on prerogative; he made a caſe therefore for the court, Lord Parker being Chief Juſtice; ſo all theſe caſes are doubted of, as not being of ſufficient authority to be ſent to this court, and rather, becauſe this court, ſo far as it went, inclined againſt the right of the crown in Almanacks: and to this hour the right of the crown has never been determined; but though the court had not given judgment, you ſee the power of injunctions, the prohibition ſtill continues with regard to this caſe. I have had many

* See Judge Yates's anſwer to theſe caſes of the Stationers Company, page 64.

years by me, a copy of a manuſcript report of what paſſed in the courſe of this argument in this court by Mr. Salkeld; I do not know whether it is got into print, I have not ſeen it yet. Mr. York had a copy of it, when he argued the caſe of the Univerſity of Cambridge and Baſkett; Mr. Salkeld argued for the defendant, and Sir Peter King for the plaintiff: I will ſtate to you, ſo far as it is material to the argument, how they put it, and the only ground that was thought tenable. Mr. Salkeld, after poſitively and expreſsly denying any power or prerogative in the crown over the preſs, or to grant any excluſive priviledge, ſays theſe words, "I take the rule in all theſe caſes to be, "that where the crown has a property or right of copy, the "king may grant it; the crown may grant the ſole print-"ing of Bibles in the Engliſh tranſlation, becauſe it was "made at their charge: The ſame reaſon holds as to the "ſtatute, year-books, and Common-Prayer books." Sir Peter King for the plaintiff argued thus, at the ſame time throwing out (wherein he does not ſeem to be very ſerious) the ſame thing I have already mentioned; ſays he, "I ar-"gue, that if the crown has a right to the Common Pray-"er, it has a right to every part of it, and the Kal-"endar it a part of the Common Prayer, and an Almanack "is the very ſame thing with the Kalendar." Parker, Chief Juſtice, ſpeaks to nothing at all ſaid at the bar; but whether the Kalendar was any part of the Common Prayer, ~~he takes no notice of it, as being nothing to~~ the purpoſe; he doubts, or rather indeed thinks poſitively, "that the Kalendar is no part of the Common Pray-"er;" and he goes back to the council of Nice, and ſays, "it is no part of it; it may be an index." Mr. Juſtice Pow-el ſays, in theſe words, "You muſt diſtinguiſh this from "the common caſes of monopolies by ſhowing ſome pro-"perty in the crown, as a bringing it within the ~~law~~ caſe of "Common-prayer books," Then he rather inclines to think "that Almanacks might be the king's, becauſe there is a "trial by Almanacks;" upon which my Lord Parker replies,

"he

(w takiej na kobiecie)

" he never heard of ſuch a thing; there is no trial by Al-
" manacks."

They leave it on this; it ſtands over to another argument to make it like the Common-prayer Book; whether it was or no, I do not know; I never ſaw it; but there never was a judgment; I made ſtrict enquiry, no opinion ever was given. I myſelf heard Lord Hardwicke ſay what Mr. Juſtice Willes has quoted. As to thoſe arguments of property in ſupport of the King's right, neceſſarily inferring an office; the cauſe of Baſkett and the Univerſity of Cambridge was then depending in this court, when my Lord Hardwicke made uſe of that expreſſion or argument; it has ſince been determined.

We had no idea of any prerogative in the crown over the preſs, or any power to reſtrain it by excluſive privileges, or any power to controul it. The ſubject matter upon which a man might write, or the manner in which he might treat it, we reſt it on the property of the King's right of original publication. Acts of parliament are the works of the legiſlature; though the King has the executive part, and as the head and ſovereign, their publication has always belonged to him *. The art of printing has only varied the mode, and though printing be within legal memory, we thought to uſe it ſince the invention of printing very material; and whoever looks into Mr. Yorke's argument, upon which, in a great meaſure, the opinion of the court went, (I do not ſay throughout, I ſay in a great meaſure) will ſee the great pains he takes to ſhew the original property in the crown; though the King may grant a concurrent right; for in that caſe he grants a concurrent right, and he might grant it to ten thouſand; he might grant it

* The preſent queſtion does not interfere with the King's prerogative, although a very ſtrong argument may be deduced from it againſt a common-law right; for the author of any law-book, ſuch as Vinner's Abridgement, was not allowed to print his own work; it was reckoned prerogative-copy, and taken out of his hands. If his right to his own work was good at common-law, one ſhould think this could not be done legally, and the law-printers prevail againſt the author. (See the caſe of Vinner's Abridgement.)

to

to every member of the Stationers Company; he might grant it to every bookſeller. We had no idea, that the firſt edition made the copy and acts of parliament common; and yet a man may tranſcribe an act or a record; and any perſon may make laborious ſearches and abſtracts of records, and have a right to print them. But before we come to that reaſon, Lord Hardwicke had reaſoned in the ſame way on the caſe of Manby and Owen and others, but the perſons who had bought the ſeſſion paper of my Lord Mayor, and had I think given him a hundred guineas for it; and upon an affidavit that my Lord Mayor had always appointed the printer of that paper, and its being uſual for my Lord to take a ſum of money for it, and the defendant had pirated it, my Lord conſidered the grant as property; it was acquieſced under, and the defendant was not adviſed to proceed further by appeal or decree.

Here nothing is more manifeſt, than that it was an infringement on the property of the publiſher, for had it been a contempt of the Old Bailey, I do not think any court of Weſtminſter-hall would have interfered in it. The court were of opinion the copy was transferred, and it was not by the firſt publication made common: all the reaſons of ſubſequent editions ſhould be correct, hold equally to an author; his name ſhould not be made uſe of againſt his will. The copy of the Hebrew Bible, the Greek Teſtament, or the Septuagint does not belong to the King; it is common; but the Engliſh tranſlation he bought, therefore it has been concluded to be his property. If any perſon has done as in the inſtance I am going to mention, has turned the writings of Solomon or Job into verſe; the King could ſay it is the author's work,———which ſhows the power of the King reſts in property, not from any controul over the ſubject matter; his whole right reſts on that foundation; every copy he has muſt reſt upon that foundation by the common law; what other grounds (which is one of the ancienteſt copies that is) can there be for the king having a property in the Latin Grammar? why, the

which if &c

the king wrote it; he made it: Is there any thing in the Latin Grammar to convey ſuch a prerogative? Whatever can be ſaid, it is by analogy the caſe of authors; the caſe of authors muſt hold concluſive with authors. As to all the other topics, I ſaid in the outſet it would be very nugatory for me to go into them; I peruſed before, and concurred in and gave my opinion to the two arguments firſt mentioned, and I deſire to be underſtood in effect as repeating them. From the manner of penning that act, which is always the caſe when an act of parliament is new caſt into a committee, when it does not go only with little alterations, there are always inaccuracies; for one clauſe cannot be amended without prejudice to the reſt; I have often thought it was a plauſible objection to the act of parliament; but I am perſuaded that it is abſolutely impoſſible to apply this act into an act to take away the property of authors if they had any; it cannot be the words of the preamble; it cannot be the intention; and whatever ſtreſs may be laid on particular expreſſions, they will appear to have no great weight, I think in my apprehenſion. In the firſt place, as to the price clauſe, it is a general clauſe.

There is a ſtatute of Henry VIII. which makes the ſame proviſion, that the price of books ſhall not be enhanced; therefore, whoever enhances the price of books, acts againſt common law, and againſt the general proviſion in this act. Then as to the words *no longer*; why, to ſhow how little ſtreſs is to be laid on that, in one clauſe, where it gives fourteen years and no longer, ſo it will ſay twenty-one years and no longer *; but when it gives a term to the author, in caſe he ſurvives the fourteen years, it does not ſay *no longer*. Now had they any different meaning in the two clauſes? impoſſible.

* The act is clear on this head; for it was ſuch books as were in print before 1710, of which twenty-one years were granted; and after that time they were expreſsly to be common property.—For books printed after 1710, fourteen years were given certain, and fourteen more eventually. There is no claſhing or contradiction here; and no monopoly is granted at all to any author, unleſs he complies with the proviſions or ſtipulations of the ſtatute. What the honourable judge means by this way of arguing is not very obvious, unleſs it is to quibble.

If

If a perſon gives a leaſe for twenty-one years, he means no longer to be ſure. The title is only once read; it paſſes on the third reading; which in the body of the act is called *ſecuring the property*. Some other obſervations were made on this act that ſeem to claſh a little with the arguments on a common-law right. Much ſtreſs is laid on the objections to a common-law right; as, when it ſhall begin? what entry to prevent perſons from offending? This is quite different from the ſtatute; for there they muſt begin from the entry, and there muſt be an entry; and a great deal of ſtreſs is laid upon the entering of it; but then by reaſon of the force of the conſtant courſe of Chancery as to caſes within the term of years, which has no regard to the entry, why then it is argued, that the act of parliament did not deem an entry to be neceſſary; that the act of parliament means to give a right though there is no entry at all: Then where is the notoriety to prevent perſons from offending? ſo the act of parliament adopts all the offences that lay at common law, as a common-law right. Yet it is contended the act of parliament meant to give him a new property, and without giving any books to the great libraries, which was a proper tax, or conforming to any of the proviſions of the act*. I have not the leaſt doubt, if the conſtructions of the act of parliament, that ſays they ſhall have a right for fourteen years, is to be taken as an abſolute and independent clauſe detached from all the reſt of the act, I ſay, if the act had ſaid nothing more, but that an author ſhould have no longer time for printing his book but fourteen years, I take it on that ground, that an action for the caſe will lay for the proprietors, and in a bill in equity will be given for him; but then it turns on the clauſe, that no benefit ſhould be taken under it by any author who does not comply with the conditions of entering his book; why then, no other

* It is not mentioned who contends that the literal ſenſe of the act ſhould not be complied with, otherwiſe a poſitive anſwer might have been given: None of the Scots bookſellers object to the act with all its meanings. The reaſoning in the next paragraph is very curious, or rather ſophiſtical.

have

right can poſſibly follow, becauſe the whole depends on the preciſe form of the act of parliament, and fixes the preciſe remedies he ſhall purſue to attain it. As to all the other arguments from the act of parliament, I refer to thoſe that have been made uſe of in the two firſt arguments, which I think are very concluſive; and I think, very little ſhort of demonſtration, to ſhew they had this right exiſting before: that a doubt aroſe in the committee of carrying the propoſition to the extent in which the bill was brought in, ſeems moſt likely and probable; but that they went ſo far as to give additional penalties for a term, without meaning to decide one way or other, whether there was or was not a common-law right; and to ſhew that they did not mean to decide againſt the author; yet it is very ſtriking and particular, they have left the preamble, as to the preceding right, in ſuch a manner as any man would conclude that they meant to declare a right as exiſting at common law *: And then the ſaving clauſe is moſt ſtrong; it is added, and can have no meaning at all if it has not this meaning, to ſave patent-rights; there is not a word about patent-rights in the act; to ſave the property of the King; there is not a word about the property of the King; to prevent a diſpute between John and Thomas, as to who is intitled to the work; there is not a queſtion about it; it ſays the proprietor: it muſt therefore mean to leave it a general queſtion open †. It is very probable ſome might think that general point is, they thought legal penalties would ſecure them; but they were miſtaken: Authors are the moſt ignorant race of men with regard to their intereſt, and ſecuring it: It was but till the reign of the late King they found out that the King could give them under his ſign manual excluſive privileges: Pira-

* Judge Yates is of a very different opinion; ſee pages 75 and 83; and alſo the notes on pages 26 and 44.—Likewiſe Lord Mansfield's opinion in the caſe of Evans, and Young, &c. annexed, pages 107 and 110.

† If this ſuppoſed meaning, or reaſoning by inference, is ſufficient to repeal a poſitive ſtatute, how dangerous muſt the ſituation of all thoſe be, who truſt for protection in this or any other act of parliament.

ting went on after the expiration of the licenſing act, therefore they were very deſirous to have penalties. But to conſider a private bill, brought in upon a private petition, and ſent to the committee as a bill to aſſiſt them, that bill changed by a committee to a bill of pains and penalties againſt them! that is impoſſible; it is violating all rules of a right conſtruction. There is but one thing more I have to mention. I will by way of caution deſire to be underſtood to refer to and adopt every thing ſaid in the two firſt arguments, that confine this judgment to the facts found by the ſpecial verdict; and to the obſervations that were not found. A variety of different circumſtances may ariſe, and when they ariſe, to that difference they muſt ſtand upon their own ground. And therefore I own, after much conſideration, it is a queſtion I have travelled in for a great number of years; I argued almoſt all the caſes that have been quoted; I argued the ſolemn one of Milton before Lord Hardwicke; I argued the caſe of Millar and ——— in the Houſe of Lords; it was by my advice that many of the precedents were tried, and We have all equally endeavoured to perſuade one another *; and I do not know whether it may not be very advantageous, that there has been this difference of opinion, for it has been the occaſion of going into the whole of the queſtion, and the whole of the arguments much more at large, and it is a general queſtion that concerns a vaſt number of people, now and for the time to come, it concerns the whole kingdom: And therefore I think it is of publick advantage, that we have had different perceptions of this queſtion, that has occaſioned its being ſo minutely and ſo thoroughly gone into. And, as I ſaid, I am of opinion with the judgment for the plaintiff; and as three of us are of this opinion, judgment muſt be entered for the plaintiff, and let a rule be made out accordingly.

* See the note on page 90.

AS

AS it is intended to throw as much light as poſſible on this queſtion of Literary Property, the Editor, before he proceeds to the Appendix, takes the liberty of mentioning two opinions, ſaid to be given by the Right Honourable Lord Mansfield, which though not for book cauſes, yet may perhaps throw ſome light on this matter.

The firſt is the caſe of the Chamberlain of London, againſt Allan Evans, Eſq; for not ſerving the office of Sheriff, he being a Diſſenter, and did not receive the Sacrament, according to the rites of the Church of England: it was heard in the Houſe of Lords, in February 1767; and as Lord Mansfield's ſpeech on that occaſion, is printed at large in the London Evening Poſt of the 5th, and 7th February 1771, we ſhall here give only a ſhort extract or two from it, which, we think, will illuſtrate this caſe of Literary Property.

"If it is a crime not to take the Sacrament at church, "it muſt be a crime by ſome law, which muſt be either "common or ſtatute law; the canon law, inforcing it, de- "pending wholly upon the ſtatute law. Now the ſtatute "law is repealed, as to perſons capable of pleading that "they are ſo and ſo qualified; and therefore the canon "law is repealed with regard to thoſe perſons. If it is a "crime by common law, it muſt be ſo either by uſage or "principle. *There is no uſage or cuſtom, independent of "poſitive law*, which makes nonconformity a crime. The "eternal principles of natural religion are part of the com- "mon law; the eſſential principles of revealed religion are "part of the common law; ſo that any perſon reviling, "ſubverting, or ridiculing them, may be proſecuted at "common law. But it cannot be ſhewn from the prin- "ciples of natural or revealed religion, that, *independent "of poſitive law*, temporal puniſhments ought to be in- "flicted for mere opinions with reſpect to particular "modes of worſhip.

"Perſecution for a ſincere, though erroneous conſci-

" ence, is not to be deduced from reaſon or the fitneſs of " things; it can only ſtand upon poſitive law."

And again towards the concluſion of this very judicious and eloquent ſpeech, his Lordſhip ſays, " What bloodſhed " and confuſion have been occaſioned from the reign of " Henry the Fourth, when the firſt penal ſtatutes were e- " nacted, down to the revolution in this kingdom, by laws " made to force conſcience? There is nothing certainly " more unreaſonable, more inconſiſtent with the rights of " human nature, more contrary to the ſpirit and precepts " of the Chriſtian Religion, more iniquitious and unjuſt, " more impolitic, than perſecution. It is againſt natural " religion, revealed religion, and ſound policy.

" Sad experience, and a large mind, taught that great " man the Preſident de Thou, this doctrine: Let any man " read the many admirable things which, though a Papiſt, " he hath dared to advance upon the ſubject, in the dedi- " cation of his hiſtory to Harry the Fourth of France " (which I never read without rapture), and he will be " fully convinced, not only how cruel, but how impolitic, " it is to perſecute for religious opinions. I am ſorry, that " of late his countrymen have begun to open their eyes, ſee " their error, and adopt his ſentiments: I ſhould not have " broke my heart (I hope I may ſay ſo without breach of " chriſtian charity), if France had continued to cheriſh " the Jeſuits, and to perſecute the Huguenots. There was " no occaſion to revoke the Edict of Nantz; the Jeſuits " needed only to have adviſed a plan ſimiliar to what is " contended for in the preſent caſe: Make a law to render " them incapable of office; make another, to puniſh them " for not ſerving. If they accept, puniſh them (for it is " admitted on all hands, that the defendant in the cauſe " before your Lordſhips is proſecutable for taking the of- " fice upon him). If they accept, puniſh them; if they " ſay, yes, puniſh them; if they ſay, no, puniſh them. My " Lords, this is a moſt exquiſite dilemma, from which there " is no eſcaping; it is a trap a man cannot get out of; it

" is

" is as bad perſecution as that of Procruſtes. If they are " too ſhort, ſtretch them; if they are too long, lop them. " Small would have been their conſolation, to have been " gravely told, The edict of Nantz is kept inviolable; you " have the full benefit of that act of toleration; you may " take the ſacrament in your own way with impunity; you " are not compelled to go to Maſs. Was this caſe but told " in the city of London as of a proceeding in France, how " would they exclaim againſt the Jeſuitical diſtinction! and " yet in truth it comes from themſelves, the Jeſuits never " thought of it; when they meant to perſecute, their act " of toleration, the edict of Nantz, was repealed.

" This bye-law, by which the Diſſenters are to be redu- " ced to this wretched dilemma, is a bye-law of the city, a " local corporation, *contrary to an act of parliament, which " is the law of the land;* a modern bye-law, of very mo- " dern date, made long ſince the corporation act, long ſince " the toleration-act, in the face of them; for they knew " theſe laws were in being. It was made in ſome year of the " reign of the late King; I forget which; but it was made " about the time of building the Manſion houſe. Now, " if it could be ſuppoſed the city have a power of making " ſuch a bye-law, it would entirely ſubvert the toleration- " act, the deſign of which was to exempt the Diſſenters " from all penalties; for by ſuch a bye-law they have it in " their power to make every Diſſenter pay a fine of ſix " hundred pounds, or any ſum they pleaſe; for it amounts " to that."

From what is ſaid above, it certainly may be inferred, or rather aſſerted, that there is no uſage or cuſtom independent of poſitive law, or, what is ſynonomous terms, common law is always ſuperſeded by ſtatute law; and alſo, we agree with his Lordſhip, *that if a man can be puniſhed for obeying the laws, it is a trap he cannot get out of, it is as bad a perſecution as that of Procruſtes; if the laws are too ſhort, ſtretch them; if too long, lop them.*

In the preſent judgment on the caſe of Literary Property, notwithſtanding

notwithſtanding the defendant has infringed no law, nay, what he has done by printing Thomſon's Seaſons, is authorized by a poſitive ſtatute, (the monopoly being expired,) yet judgment has been given againſt him.

It may alſo be obſerved, that the bye-laws of the Stationers Company have been much inſiſted upon in theſe arguments, as making againſt the defendant; Yet Lord M. affirms above, that any bye-law of a city, or corporation, againſt a poſitive ſtatute, which is the law of the land, is good for nothing; and all honeſt men will agree with his Lordſhip in that ſentiment.

CASE of YOUNG and others, againſt JOHNSTON.

BY an act of the 14th George II. regulating the proceedings at election of Members to ſerve in Parliament for the boroughs of Scotland, and the previous election of Magiſtrates, and office-bearers of the corporations who have the right of election. "It is made lawful for *any conſtituent member* of a meeting for election of magiſtrates, who "ſhall apprehend any wrong, to have been done by the "majority of ſuch meeting, to apply to the Court of Seſ- "ſion by a *ſummary complaint* for rectifying ſuch abuſe, or "for making void the whole election; ſo as ſuch complaint "be preſented to the ſaid Court of Seſſion within two ka- "lendar months after the annual election of Magiſtrates "and Counſellors."

In the caſe of *Young* and others, conſtituent members of a meeting for election of magiſtrates, againſt *Johnſton*, and others lately determined in the Houſe of Lords, it appeared that *Young* and the reſpondents, in the appeal, and plaintiff's in the Court below, had allowed the two kalendar months to elapſe without preferring their complaint of bribery and corruption, againſt the voters at an annual election of magiſtrates, whereby they loſt the benefit of the *ſummary complaint*, allowed by the foreſaid act, for rectifying

ing abuſes or avoiding the election. But although not entitled after this to the *ſummary complaint*, they brought an action at *common law*, and after various proceedings, and proofs of the acts of bribery and corruption, in that action the plaintiffs prevailed, and the election was avoided. An appeal was taken againſt this decree, and the chief and principal reaſon urged for a reverſal, (but not mentioned in the printed caſe, not having been thought of in the court below; and only for the firſt time ſtated *viva voce* from the bar) was, that the court had given judgment in an action which appeared incompetent; the ſtatute having limited the time, and pointed out the only mode for obtaining redreſs of ſuch wrongs, which had been neglected in the preſent caſe. The anſwer there made by the reſpondents was, that the act only pointed out a new mode of action for redreſs of bribery and corruption, and other wrongs at an annual election; but that it was abſurd, to ſuppoſe all actions which were *ab ante* competent to a party at common law, for redreſs of theſe wrongs, were by this ſtatute taken away. That it was an eſtabliſhed doctrine, *That where a ſtatute only* pointed out and *allowed a particular* and new *mode* for redreſs, in a caſe which was before *remediable* at common law, the common law remedy remained entire. However, in this caſe of *Young* and *Johnſton*, the decree of the court below was reverſed upon this point of law; the merits of the cauſe not being gone into, and a noble Lord who ſpoke on the occaſion, and who wiſhed to ſpeak for the ſake of clearing up and fixing the rule, expreſſed himſelf very clearly of opinion, "That no complaint being brought "for avoiding the election within two kalendar months, "but only an action at *common law*, no ſuch action could "be maintained. That the intendment of the legiſlature "was to take into conſideration all the election laws, and "by that ſtatute, ſo full and particular, to at once cut off "and put an end to all queſtions and diſputes that might "have ariſen upon theſe laws."

This opinion, is ſuppoſed to be very ſimilar to the caſe

caſe of Millar and Taylor, for printing Thomſon's Seaſons: the common-law right, or remedy in Young's caſe, is clearly found to be ſuperſeded by the ſtatute; and ſo it ought to be in Millar's caſe; the act of Queen Anne having ſuperſeded all common law right in authors to their works, if they ever had any; and it is believed, it will be difficult to give any unexceptionable inſtance, where a poſitive ſtatute was diſannulled, or ſet aſide by any pretended common-law right. This ſtatute of Queen Anne has conſidered fully, and included all the prior rights of authors, and ſettled this kind of property on a clear, equitable and ſolid foundation; and it muſt be altered, or repealed by parliament, before any perſon can legally be puniſhed for printing any work, of which the terms of the monopoly are expired according to this ſtatute.

APPENDIX

APPENDIX.

Containing a ſhort view of LITERARY PROPERTY.

FROM the foregoing arguments it appears, that the Judges Willes, Aſton, and Lord Chief Juſtice Mansfield, find that authors and their aſſigns have a perpetual excluſive monopoly in their copies by a common-law right, independent of the ſtatute 8*vo Annæ*, or any ſtatute whatever: And that Sir Joſeph Yates is of opinion, that Literary Property is not known to the common law, but is a ſtatutary property only, and the excluſive monopoly after publication can ſubſiſt no longer than for the terms mentioned in the act of Queen Anne.

All the authors who have wrote on this ſubject of Literary property, (excepting the Biſhop of Glouceſter, and another unknown one) are of opinion with Sir Joſeph Yates, that this is a ſtatutary right only, and ſolely depending upon the act of Queen Anne.—Such as deſire to conſult theſe authors, and inveſtigate the matter at large, will find their names, or titles of their works below *.——Almoſt every new

* Literary property is limited to the terms mentioned in the ſtatute of Queen Anne, by the opinions of the following writers, viz. Ames, in his Hiſtory of Printing: Mattaire's Annales Typographicæ: Dr. Burns' Eccleſiaſtical Law: Savary's Dictionary of Commerce, tranſlated by Poſtlethwayte: Mortimer's Dictionary: An Enquiry into the Nature and Origin of Literary Property: Judge Blackſtone in his Commentaries, can find nothing to ſupport any right independent of the ſtatute: The Biſhop of C's. Obſervations on Literary Property, printed at Cambridge 1770; and the author of a Letter concerning Libels.—Alſo, the following Scots writers concur in the ſame opinion: viz. Lord Bankton in his Inſtitutes: Lord Kaims's remarkable Deciſions of the Court of Seſſion: Swinton's Abridgement of the Statutes: Falconer's Deciſions of the Court of Seſſion: A ſhort State of Literary Property, publiſhed anno 1763: Conſiderations on the Nature and Origin of Literary Property, printed anno 1767; and a Letter from a gentleman in Edinburgh to his friend in London, printed 1769. &c.

new work of any note, is directly re-publiſhed in Ireland, without the proprietors leave or conſent: The Univerſal Hiſtory, Hume, and Robertſon's Hiſtories, and Dr. Blackſtone's Commentaries, are inſtances of this practice; yet no bookſeller or author ever ventured to challenge the Iriſh bookſellers, or to bring an action againſt them in the courts of law in Dublin, although they are not ignorant of this practice. They do indeed endeavour to ſeize in England, ſuch books as are printed in Ireland contrary to the ſtatute; but if authors or their aſſigns are to have a common law right of monopoly, which is to endure for ever, why are they ſo ſhy about trying the queſtion in an Iriſh court of law?—From this it is clear, that a common-law right of authors to their works is not known in Ireland.

It will be neceſſary to examine this common law right a little more fully, and ſee if ever it was known in Scotland or not ——Prior to the ſtatute of Queen Anne, it was the common practice of ſuch authors or publiſhers as wanted to reap the profits of their works, to take out a patent from the King and council, or the parliament. The *Regiam Majeſtatem*, which is the moſt ancient of our Scots law-books, was printed in this way; Mr. Skeen got a monopoly of this book for twenty years, by patent dated the 6th December 1608, which is prefixed to the work itſelf: This ſhows that authors or publiſhers, at that period, had no notion of any common-law right to protect their publications.

The next inſtance we ſhall mention is, the great Craig of Riccartoun, one of the ableſt lawyers of his time, and author of a celebrated book on the feudal law, intitled *De*

There is not one ſingle writer either on the Engliſh or Scots law, that gives the ſmalleſt countenance to an excluſive perpetual monopoly of books; and only two pamphlets have been wrote in ſupport of that extraordinary claim; one of them is ſuppoſed to be by Dr. Warburton, now Biſhop of Glouceſter: His work is intitled, A Letter from an Author to a Member of Parliament, concerning Literary Property, printed in the year 1747; in which many fulſome compliments are paid to Lord M. The other is a Vindication of the excluſive right of authors, written anno 1762.

Feudis:

Feudis: This author had no idea of any common-law right to protect his property, but applied to parliament for that purpose: We have in a note annexed *, given a copy of his petition, and the privilege granted him for printing his own book *de Feudis*, for twenty-one years. This inſtance is a very ſtrong proof, that no common law right of authors to the excluſive property of their works, ſubſiſted at that period.

But to come nearer the preſent times; Sir George Mackenzie of Roſehaugh, who was Lord Advocate for Scotland, and alſo one of the greateſt lawyers of his time, was obliged to apply for a patent to ſecure the profits of his book on the Criminal Law: This patent is prefixed to his quarto edition of the Criminal Law, (a copy of which is alſo annexed in a note †) publiſhed at Edinburgh in the year 1678.

* *COPY, ACT paſſed in the firſt parliament of King Charles I. (anno 1633) in favours of Mr. Robert Craige, for printing the book called* DE FEUDIS. *Extracted from the records of the unprinted acts.*

OUR Sovereign Lord and eſtates of parliament, having conſidered an petition and deſire given in in parliament be the College of Juſtice, and Mr. Robert Craige advocate, ſon to umquhile Mr. Thomas Craige advocate, craving that command and warrant might be granted for imprenting the three volumes written be the ſaid umquhile Mr. Thomas Craige, intitulat *De Feudis*, in reſpect that the ſame would be very uſeful to the country, and for the inſtruction of them wha aſpire to the knawledge and practick thereof, as the ſaid petition at mair length bears. Our ſaid Sovereign Lord and eſtates forefaid, Ordaines the ſaid three volumes written be the ſaid umquhile Mr. Thomas Craige entitulat *De Feudis*, to be viſite and overſeen be Sir Thomas Hope of Craighall, Knight Baronet, his Highneſs's advocate; Sir Alexander Gibſon of Durie, Knight; Sir Andrew Fletcher of Innerpeffar, Knight, two of the ordinar Senators of the College of Juſtice; and Mr. —— Stewart advocate, before the ſaid Lords. And thereafter Ordaines the ſaid three volumes, entitulat *De Feudis*, as ſaid is, to be imprented: And grants the privilege for imprenting thereof, to the ſaid Mr. Robert Craige, his heirs and executors; to whom Ordaines the haill benefite, comoditie and ſale of the ſaid volumes to pertain, for the ſpace of twenty-one years after the date hereof: And Ordaines nane of the ſaid books to be inbrought and ſauld during the ſaid ſpace of twenty-one years, without the ſaid Mr. Robert his tollerance, under the pain of confiſcation of the ſame to the uſe and behoof of the ſaid Mr. Robert and his foreſaids.

† *Edinburgh, the 7th April,* 1677.

IT is ordered by the Lords of his Majeſty's moſt honourable privy council, That none have reprint, or import into this kingdom, this book, entituled,

1678. If ſo great a man as Sir George Mackenzie was obliged to have recourſe for a patent, to protect what he had an undoubted right to at common-law, it will ſhow that this common-law right was at leaſt altogether unknown in Scotland, in his time.

In the remarkable deciſions of the Court of Seſſion, publiſhed by the learned Lord Kaims, now one of the Judges of the Court of Seſſion, there is a very full recital of a book cauſe, Millar and Midwinter, bookſellers in London, againſt Hamilton and other Scots bookſellers, with the judgment of the Court of Seſſion, (conſiſting of fifteen judges) which was given in favours of the Scots bookſellers; and the monopoly of authors or their aſſigns, reſtricted to fourteen, and eventually to twenty-eight years, as mentioned in the ſtatute of Queen Anne. But we muſt refer the reader to the caſe itſelf, as it is too long to bring in here, and it would be doing injuſtice to the author to abridge it.

Andrew Macdowal, Eſq; afterwards Lord Bankton, one of the judges of the Court of Seſſion, in his Inſtitutes of the Laws of Scotland, (a book of the higheſt authority) vol. i page 411, ſays:

"Becauſe commerce ought to be free to all, therefore "monopolies are prohibited. By theſe, private perſons or "ſocieties enter into combinations, or obtain grants to in-"groſs to themſelves a certain ſpecies of merchandiſe, "trade or manufacture, in excluſion of all others from "being concerned in it: but grants to trading companies, "erected by the ſovereign into corporations, without ex-"cluſive privileges, fall not under this denomination: and "granted to the inventors of new manufactures, or authors "of books, ſecuring to them the ſole benefit of the ſame,

The Laws and Cuſtoms of Scotland, on Matters Criminal; by Sir George Mackenzie of Roſebaugh, for the ſpace of nineteen years after the date hereof, under the pain of confiſcation of the ſame, to Thomas Brown, George Swintoun and James Glen printers hereof; and further puniſhment, as the council ſhall think fit to inflict upon them.

Extracted by me THOMAS HAY.

are

" are in virtue of ſtatutes, and limited to a certain period " of years, after which they determine.

" A right of monopoly cannot be acquired on the foot- " ing of preſcription, being contrary to public right, and " the liberties of the ſubjects: nor will ſuch grant by the " king be ſecured by a private act of parliament confirming " the ſame, ſuch acts being always underſtood *Salvo jure* " *cujuſlibet*; and conſequently cannot prejudice the rights " of the whole other ſubjects, which by a monopoly would " be infringed.

" The above excluſive privilege is granted only to au- " thors of books, or their aſſigns, that enter them in Sta- " tioners hall in London, as the ſtatutes in that behalf di- " rect; and in ſuch caſe they are intitled to the ſole right " of printing or ſelling the books for fourteen years after " the publication; and whoever ſhall print, reprint, or " knowingly ſell the ſame, without conſent of the owner, " within that time, forfeits the books, and one penny for " each ſheet, the one half to the king, and the other to " the purſuer; and the importing ſuch books reprinted a- " broad ſubjects the offender to double the value, beſides " forfeiture of the books and 5 *l.* By theſe ſtatutes, nine " copies of each book entered in the hall are to be lodged " with the company of ſtationers, for behoof of the facul- " ties and univerſities therein mentioned: if the author is " alive at the expiration of the term, the privilege belongs " to him for other fourteen years.

" Thoſe who incroach upon this privilege are not only " liable to the above penalties, but likewiſe to the party's " damages, at leaſt to the extent of the profits made by " them. All offences againſt the act of Queen Anne muſt " be proſecuted within three months of the offence com- " mitted. Whether that limitation concerned the damages " of the party injured, as well as the penalties, was much " conteſted in a late caſe: and, after variation of judg- " ments, it was at laſt finally determined by the Court of " Seſſion, that it did."

This

This Institute of the Laws of Scotland, was undertaken at first at the author's expence, and he thought it absolutely necessary for securing the property, to comply literally with the terms of the statute, and enter the book before publication, which was done accordingly in the year 1751; his notion was, if that was not done, he could hold no exclusive privilege in his own work, and he had no idea of any other right to it, after publication, than what is granted by the statute of Queen Anne.

After mentioning these great authorities, it may fairly be concluded, that this new doctrine of a common-law right of authors in their works, is totally unknown either by the laws or customs of Scotland; and whether the late decision of the King's-Bench should be affirmed by a superior court or not, it is but reasonable to suppose, that no printer or bookseller in Scotland can suffer by it, as all the subjects of that part of the kingdom are confirmed in their natural rights and privileges, by an express article of the Union, which gives them a right to a free trade, according to the laws of Scotland then in force, or as they shall afterwards be altered by a British parliament: If we consider further, that the statute of Queen Anne, which expressly settles this dispute about Literary Property on an equitable footing: An author's exclusive right is by it secured to him for at least fourteen years, and often for twenty-eight years, and though his exclusive right then ceases, yet he has still a right in common with others to print and publish as many copies of the book as he pleases; what reason, then have these monopolists to complain, that they have not a perpetual or eternal monopoly of their works? The laws of the land say, they shall have it only for a limited time: Common sense says, it is absurd that any monopoly against the common rights of mankind should endure for ever; and the expediency and fitness of things say, that the poor and middling class of mankind ought not to be excluded from purchasing cheap and useful editions of books, such as their circumstances can afford. A perpetual monopoly to booksellers therefore,

therefore, will appear to be abſurd, contrary to an expreſs ſtatute now in force, and alſo to equity and common ſenſe.

It may alſo be noticed here, that authors have never complained of the ſhortneſs of the terms granted by ſtatute, if they did, the legiſlature might conſider their claim to a longer monopoly, and grant their requeſt or not, as to them might appear reaſonable: but ſurely no bookſeller has any title to complain; for as he knows the terms of the ſtatute, he can always ſuit the price he pays for the copy to the time he buys it for: As well might a perſon who takes a leaſe of an eſtate or farm, complain that it is not continued to him and his heirs for ever, as a bookſeller complain that he has not a perpetual monopoly. Printing and bookſelling are lawful employments, it would be the groſſeſt injuſtice to deprive perſons for ever of exerciſing theſe callings; as far as forbid by poſitive law, they muſt obey, but after the monopoly is out, they are no longer reſtrained. Lord Kaims obſerves in the Deciſions before mentioned, that "It is a rule, that laws which abridge the common privileges of mankind are ſtrictly to be interpreted: Monopolies and reſtraints are introduced by ſtatute contrary to natural liberty, debarring the liege either abſolutely, or in favour of certain perſons, from doing certain things, which are otherwiſe innocent and lawful. But whatever be the expediency of ſuch ſtatutes, they are not to be extended by judges beyond their preciſe terms. It would be groſs injuſtice ſo to extend them: It would be abridging natural liberty without the authority of law, which is worſe than private violence."

We ſhall only obſerve further on this head, that no ſuch reſtraint is laid upon the preſs in any country, as this perpetual excluſive monopoly claimed by the London bookſellers. In France they have patents from ten to twenty years: the great Abbe Colbert, prime miniſter to Lewis

XIV.

XIV. will ſurely have ſome weight: The reader will find his opinion below *.

We proceed next to mention ſome circumſtances of the late trial between Millar plaintiff, and Taylor defendant, for printing or vending Thomſon's Seaſons: The book was printed firſt of all in the year 1727; the monopoly of twenty-eight years, expired in the year 1755; after that period many editions of it were printed openly, with the names of the publiſhers affixed to the title-page, without any challenge from Millar, (who had purchaſed the copy-right from the author Thomſon,) till the year 1763, when Millar got an injunction in Chancery againſt Donaldſon, to ſtop the ſale of an edition he had printed, which was afterwards removed by Lord Chancellor Northington, upon the defendant's giving in anſwers: After which Millar proceeded no farther in his ſuit with this defendant, but began another for the ſame book with Taylor, as he no doubt thought him a fitter perſon to be dealt with in caſe at any time a compromiſe ſhould be needful. This cauſe was remitted from the Chancery at the plaintiff's deſire to the Court of King's-Bench, there to be tried by a jury of twelve men: After a delay of ſome years, it came at laſt before a jury;

* "The Stationers trade in the country, ſtands in need eſpecially of your Majeſty to appoint it ſome other laws, becauſe it is ſubject to the inquiſition of the ſtationers of Paris, who, by meaſs of the privileges which they obtain out of the Chancery, hold all the others of the kingdom in ſuch a dependence, that they muſt either ſtarve, or run the hazard of undoing themſelves. If your Majeſty pleaſes to take compaſſion of them, you muſt reſtrain thoſe privileges to the ſole city of Paris, and that it may be allowed to the others to follow their methods. Paris, of itſelf alone, is not worth more than the reſt of the kingdom; and it is not juſt that above 2000 families ſhould periſh for a ſmall number of the ſtationers there.

"The council is full of inſtances, which are formed on the like caſe, and your kingdom hath an intereſt in it, that your Majeſty pronounces in favours of the oppreſſed: for the books which one hath from Paris, are ſo dear, that the poor cannot come up to them; and yet a perſon, who hath a hundred crowns revenue, hath the neceſſity of inſtruction, as well as he who hath 2000. One muſt therefore furniſh him with the means to do his duty, which he cannot attain to ſo long as one holds his neck under foot." Bernard's Tranſlation of Colbert's Political Teſtament, printed at London, 1695, page 355.

but

but it is ſaid, that the jury was inſtructed to find the fact of publication only, which the defendant had owned; but the crime of publiſhing this book, the court reſerved for their own cognizance; and after a delay of a good many months, they delivered their opinions, as inſerted at large in this publication.——We cannot help obſerving, that it is commonly reported, this trial was conducted much in the ſame manner with that of Woodfall and others for libels, which has been of late the ſubject of enquiry in both Houſes of Parliament. This mode of proſecution, has been almoſt generally condemned, as being tyrannical and unjuſt; the greateſt lawyers agree, that both the fact and the crime ought to be determined by the jury *. In this caſe, it ſurely was not above their comprehenſion to judge, whether the defendant had, or had not infringed the ſtatute of Queen Anne; if he had not, the publication was warranted by poſitive law: it was ſo ſimple a queſtion, that a jury of twelve honeſt men could not miſapprehend it: Beſides, it is alſo ſaid, that the plaintiff Millar being dead before judgment was given, throws a nullity on the whole, and there ought to have been a new trial by the plaintiff's heirs or executors: Whatever be in that, it is certainly no unnatural inference to ſay, that this trial cannot properly be brought as a precedent againſt any other defendant in a book-cauſe, for theſe two reaſons; firſt, becauſe the crime, as well as the fact of publication, was not left to the determination of the jury; and, ſecondly, becauſe the plaintiff had died before judgment was given, and no new proſecution was commenced.

There is alſo another thing which ought to be mentioned here, and that is, the after-conduct of the defendant: he at firſt took out a writ of error againſt the determination of the King's Bench, but was afterwards prevailed with to compromiſe matters with the bookſellers: the reaſon is obvious,

* See this ſubject ably handled, in a late celebrated publication, entitled, A ſecond Letter to Almon on Libels.

they wanted that no chance ſhould be given for a reverſal of this judgment; and their arguments with Taylor were ſo powerful, (although a certain perſon had offered to be at one half of the expenſe,) that he withdrew his appeal, upon which the bookſellers puffed away in all the London news-papers, as if they had obtained a compleat victory, of having finally ſettled the long conteſted queſtion of Literary Property, by what they call a *ſolemn judgment in Weſtminſter-hall*. They had tried the ſame game formerly; firſt in the year 1749, with one Oſborne, a London bookſeller, whom they at firſt proſecuted in Chancery; but being very doubtful of the iſſue, they bought him off, paid the expenſes, it is ſaid, of ſuit on both ſides, and allow him an annual penſion to this day, on condition of his not printing upon them. About ten years after that, a mock ſuit was commenced againſt one Collins of Saliſbury, (ſee the ſpeeches, page 97) for vending a Scots edition of the Spectator; but a connivance having been diſcovered betwixt the plaintiff and defendant, no judgment was given. It is very ſurpriſing, how much artifice has all along been uſed by the London bookſellers, to hinder a final judgment on a book-cauſe in the Supreme Court of the nation; they are juſtly afraid of the iſſue, which, as long as the ſtatute of Queen Anne ſtands unrepealed, muſt ſurely go againſt them; and notwithſtanding, what they call a late *ſolemn judgment*, they have not hitherto advanced one ſtep farther, than by combinations to diſtreſs and haraſs particular perſons.

It may be obſerved, that if ever this doctrine of a perpetual excluſive monopoly in books ſhould prevail, it will be attended with endleſs litigation and confuſion, even among authors and bookſellers themſelves: The following caſe may perhaps illuſtrate this obſervation.——The celebrated Mr. Pope ſold his Homer in the year 1712, for twelve hundred pounds; he conveys the copy-right for fourteen years certain, *or as long after, as he is enabled by the ſtatute of Queen Anne* * *to do it*; this he mentions expreſsly in

* In the year 1763, about thirty of the London bookſellers, who ſtile themſelves proprietors of Pope's Homer, brought a ſuit in Chancery for this article, and produced this deed of Mr. Pope's in ſupport of their claim; but on its

in the agreement: it is clear he foreſaw, that the longeſt right he could convey was twenty-eight years, fourteen years certain, and fourteen more eventual, in caſe he ſurvived the firſt term, according to an expreſs proviſo in the ſtatute. From this tranſaction or ſale, we are authoriſed to ſay, that Mr. Pope had no notion of an endleſs excluſive monopoly, or what has been ſince called a common-law right; and that the bookſeller to whom he ſold his Homer, by accepting of that deed of ſale, alſo underſtood that he purchaſed it only for the periods granted by the ſtatute. If the perpetual excluſive rights of authors ſhould ever prevail, it is clear that it is Mr. Pope's heirs, and not the bookſellers, who have a right to the profits of his Homer after the year 1740 (at which period the monopoly of 28 years elapſed). If the judgment of the King's-bench ſhould ever be confirmed by the ſupreme court, certainly Mr. Pope's heirs will have a good action againſt all the bookſellers who have printed Homer, after the year 1740, and all authors or their heirs, who believed that the ſtatute was the rule for literary property, and can ſay that they had no notion of a perpetual right, have certainly a claim either for more copy-money, or for the profits after the terms fixed by the ſtatute are elapſed. It would be moſt unreaſonable, if there has been a miſtake in this matter from the beginning, that the authors ſhould reap no benefit from it, and the bookſellers ſhall be the ſole gainers by this amazing diſcovery of a perpetual excluſive monopoly in books, which has lain concealed from the underſtandings of all mankind, in all countries of the world, from the invention of the art of printing till the year 1769, when it was firſt diſcovered by the three eminent judges before-mentioned: It is a diſcovery as wonderful as the philoſopher's ſtone would be! but unluckily, it happens to run counter to the law of the land, and will vaniſh like the baſeleſs fabric of a viſion.

Sir Joſeph Yates mentions a difficulty *, which may of-

its being noticed, in the anſwer to their bill, that their right was expired, they withdrew the ſuit altogether, for fear of a further explanation.

† See his SPEECH, middle of page 51.

ten happen among authors themſelves, who write upon the ſame ſubject, and may have the ſame reaſoning or ideas upon it: Can the author who publiſhes firſt on that ſubject, exclude all others from uſing the ſame ſet of words or ideas? Certainly he cannot. Suppoſing an author publiſhes tables of intereſt, another may alſo publiſh tables of intereſt; and if both their calculations are exact, they muſt, according to the rules of arithmetic, turn out to be the ſame: This reaſoning will alſo hold good in moſt kinds of tables or calculations, as on annuities on lives, logarithms, ſines and tangents, almanacks, &c. If the firſt publiſhers of any ſuch works are to have a perpetual monopoly, how abſurd would ſuch a poſition be, and how unjuſt to the reſt of mankind.

Sir Joſeph Yates obſerves more than once in his argument, that a perpetual excluſive property in books after publication, is no part of the common law of England †: "It "is ſtrange" ſays he, "that in all our laws where every "kind of property is abſolutely diſcuſſed, a claim ſo exten-"ſive as this, is not abſolutely eſtabliſhed; and yet it was "admitted by the plaintiff's counſel, that they could not "produce any one determination in a court of law, that "had eſtabliſhed any ſuch kind of property."—Beſides, the licenſing act is another ſtrong argument againſt a perpetual excluſive right; before that act was aboliſhed, the licenſer had it in his power and often did ſtop the publication altogether, if he diſapproved of it; here an author's right of publication was taken altogether from him, without his reaping any benefit from his own labour: whereas the ſtatute of Queen Anne, gives him in the firſt place a patent, without the expenſe of paying for it, and then the profits for a certain time, which he may either keep to himſelf, or diſpoſe of as he thinks proper. As to the nature of Literary Property, whether books can be called corporeal ſubſtances, goods, chattels, or by what other name, ſee the ſame learned argument, pages 79, and 80. We ſhall conclude this head with a few extracts from Sir Joſeph Yates's ſpeech.

* See pages 60, 61, 62, and 71. &c.

"Upon

"Upon the whole, it ſeems evident to me, that this claim cannot poſſibly be maintained on either of the grounds on which it was argued; that ſo far from being warranted by the general principles of property, every one of theſe principles are flatly againſt it; that it cannot be a part of the common law of England, whoſe exiſtence is immemorial, and long antecedent to every circumſtance of literary claim.

"It is of uſe certainly that all human ſcience ſhould be encouraged, and every man's labour properly rewarded; but every man's reward has its proper bounds; and ſurely an intire monopoly for 28 years is encouragement enough. The legiſlature have thought it ſufficient, and have expreſsly declared, they ſhall have it *no longer?* Have we any power to controul that authority, and ſay, in direct oppoſition to the ſtatute, that they ſhall have it longer, that they ſhall have it for ever? If the encouragement, that the act of parliament has given them, will not ſatisfy authors, it is not our province to extend it further; but I can never entertain ſo diſgraceful an opinion of learned men as to imagine, that the profits of publication for 28 years will not content them: I will not believe that nothing will induce them to write but an abſolute perpetual monopoly; that they have no benevolence to mankind, no honourable ambition of fame, no intention to communicate their knowledge to others; but the moſt avaritious and mercenary motives; from authors ſo very illiberal the publick would hardly receive much benefit.

"There is another light too in which the conſequences of this claim will be highly injurious to the public, and that is, the reſtraints it will lay upon the natural rights of mankind. It is every man's right to follow a lawful employment for the ſupport of himſelf and his family: Printing and bookſelling are lawful employments, and therefore every monopoly that would intrench upon theſe lawful employments, is a reſtraint upon the liberty of the ſubject; and if the printing and ſelling of every book that comes out may be confined to a few, and for ever with-held from all the reſt

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of the trade, what proviſion will the bulk of them have for their reſpective families?

"I have before obſerved the dangerous ſnares which this idea of property will lay, as it carries no proprietory marks in itſelf, and by common law is not bound to any formal ſtipulation; ſo obſcure a property, and eſpecially after the work has been a long time publiſhed, might lead many bookſellers into many litigations; and in ſuch, the moſt doubtful queſtions might ariſe, whether the author of a work did not intend it as a gift to the public; whether ſince that he has not abandoned it to the public, and at what time.

"I wiſh as ſincerely as any man, that learned authors may have all the encouragements, and all the advantages that are conſiſtent with the general rights and good of mankind. But if the monopoly now claimed be contrary to the law of property, and totally unknown to the ancient and common law of England; if the eſtabliſhing of this claim will directly contradict the legiſlative authority, and introduce a complex ſpecies of property, contrary to the end for which the whole ſyſtem of property was eſtabliſhed, it will tend to imbroil the peace of ſociety with frequent *contentions, moſt highly diſfiguring the face of literature, and highly diſguſting to a liberal mind.* And,

"Laſtly, if it ſhould ſtrip the ſubject of his natural right, I ſay, if theſe, or any of theſe miſchiefs could follow, I can never concur in eſtabliſhing this claim. The legiſlature have provided the proper encouragement, and at the ſame time guarded againſt all thoſe miſchiefs; to give that encouragement and liberal conſtruction, is my duty as a judge, and will ever be my own moſt willing inclination; but it is equally my duty, not only as a judge, but as a member of ſociety, and even as a friend to the cauſe of learning, to ſupport the limitations of the ſtatute. I ſhall therefore conclude in the words of the act of parliament: "That "the author or bookſeller ſhall have the ſole right for the "particular terms which the ſtatute has given, but no longer;" and conſequently that the plaintiff who claims a

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perpetual and unbounded monopoly, has no legal right to recover."

In the year 1734, an act was paſſed, intitled, 'An act for 'encouraging the arts of deſigning, engraving, and etching 'of prints, by VESTING the properties thereof in the in-'ventors and engravers, during the time therein mention-'ed.'—This act is every way ſimilar to that paſſed the 8th of Queen Anne for books; it gives a property to the inventors for 14 years; but being found inſufficient, it was amended by another ſtatute, in the year 1766, which gives the inventors, &c. a monopoly of their works for 28, inſtead of 14 years. The deſigners of prints might as well claim a perpetual property in their works, as bookſellers do in books, but they will not be able to make out any right at all, but what is given them by theſe ſtatutes. On account of the extraordinary genius of Hogarth, his widow was indulged with a monopoly of twenty years, after the 14 years had expired, according to the firſt act of parliament; but, before ſhe obtained this indulgence, ſeveral engravers had copied Hogarth's works, and this remarkable clauſe is made in the ſecond act, to indemnify ſuch perſons, in theſe words: 'Provided nevertheleſs, That the proprietor or proprietors 'of ſuch of the copies of the ſaid William Hogarth's works 'which have been copied and printed, and expoſed to ſale, 'after the expiration of the term of 14 years, from the time 'of their firſt publication, by the ſaid William Hogarth, and 'before the firſt day of January, (the time the ſecond mo-'nopoly of 20 years granted by this act was to commence), 'ſhall not be liable or ſubject to any of the penalties con-'tained in this act,' &c.—Here the legiſlature made a very juſt and proper diſtinction; no perſon was to be puniſhed for publiſhing Hogarth's works after the monopoly of 14 years had elapſed; and nothing could reſtrain them from copying and publiſhing all Hogarth's other works but this new law, giving a further monopoly of 20 years: This ſerves fully to explain the act of Queen Anne, for VESTING books, &c.; no perſon can ſuffer penalties, or be prohibited from reprinting ſuch books of which the monopoly

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is expired, according to that ſtatute; and until this act is repealed, all who reprint any work after the times therein mentioned, muſt certainly be protected by it, notwithſtanding the determination of any court to the contrary.

We ſhall conclude with a few quotations from Sir William Blackſtone's Commentaries on the Laws of England, a book of the higheſt authority.—He ſays, in his introduction, § 2. "The liberty of conſidering all caſes in an equi-"table light muſt not be indulged too far, leſt thereby "we deſtroy all law, and leave the deciſion of every queſ-"tion entirely in the breaſt of the judge." And again, § 3. "Common law is immemorial cuſtom; and if not a good "cuſtom, it ought to be no longer uſed; to make a good "cuſtom, the following are neceſſary requiſites: 1*mo*. That "it has been uſed ſo long, that the memory of man run-"neth not to the contrary; if any one can ſhew the be-"ginning of it, it is no good cuſtom; for which reaſon no "cuſtom can prevail againſt an expreſs act of parliament, "ſince the ſtatute itſelf is a proof of a time when ſuch a "cuſtom did not exiſt.—2*do*. It muſt have been continued "without any interruption, otherwiſe it will be void.—3*tio*. "It muſt have been peaceable and acquieſced in, and not "ſubject to contention or diſpute." Whoever will look into the *ſuppoſed* common-law right of authors or bookſellers, to a perpetual excluſive monopoly of books, after publication, will find it totally deſtitute of the above three requiſites; the cuſtom is not immemorial, it is often interrupted, and always diſputed—See the preceding arguments or opinions of the judges in this cauſe.

This learned judge ſays farther, "Penal ſtatutes muſt "be conſtrued ſtrictly.—When the common law and a ſta-"tute differ, the common law gives place to the ſtatute, "and an old ſtatute gives place to a new one: A judge "cannot conſtrue the laws, otherwiſe than according to the "letter, nor can they be ſtrained to inflict a penalty beyond "what they will warrant;" &c. *.

* We muſt refer the reader to § 3. of Judge Blackſtone's Introduction.

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